TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 484 16

JERRY DOUGLAS MEMPA, PETITIONER,

vs.

B. J. RHAY, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARY TO THE SUPREME COURT OF WASHINGTON

PETITION FOR CERTIORARI FILED AUGUST 8, 1966
CERTIORARI GRANTED FEBRUARY 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 424

JERRY DOUGLAS MEMPA, PETITIONER,

vs.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARY TO THE SUPREME COURT OF WASHINGTON

INDEX

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Cause No. 38470

In the matter of an Application For a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA, Petitioner,

vs.

B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent

PETITION FOR A WRIT OF HABEAS CORPUS

To: The Honorable Chief Justice of the Above Entitled Court:

This is an original, verified application and petition for a Writ of Habeas Corpus of Jerry Douglas Mempa, acting pro se, and he alleges, maintains, contends, and prima facie shows:

I

(1) That petitioner *is not* imprisoned, detained, or confined pursuant to any valid order, decree or judgment issued out of a court of competent jurisdiction.

II

(2) That your suppliant is illegally and/or unlawfully confined and incarcerated in the Washington State Penitentiary at Walla Walla, Washington by the Superintendent thereof, B. J. Rhay.

(3) That the cause of and/or pretense of petitioner's illegal and unlawful incarceration and confinement is a judgment and sentence issued out of the Superior Court of the State of Washington, in and for the County of Spokane, in Cause no. 16277, on the 17 day of June, 1959, for the alleged crime of taking a motor vehicle without permission of the owner.

III

(1) That the said judgment and sentence was entered in said cause no. 16277, on the 17 day of June, 1959, pursuant to and in accordance with a plea of guilty entered by this petitioner on the 17 day of June, 1959, at which time he was represented by counsel, and petitioner received probation and was released.

(2) Whereas, on the 23 day of October, 1959, petitioner was brought before the trial court and probation was revoked, at which time the petitioner was sentenced to the State Reformatory for not more than ten years, at which [fol. 2] time he *was not* accompanied by counsel nor represented by counsel at the time of his appearance before the trial court for the imposition of final judgement and sentence upon the revocation of his probation in the Superior Court of the State of Washington for Spokane County, on the 23 day of October, 1959, at which time he was entitled to representation by counsel pursuant to Art. 1, Section 22 of the State Constitution and the 6th Amendment to the Constitution of the United States. For a case the same as the foregoing one, see: *Washington State Supreme Court Cause No. 37455.* In re *Saylors* vs. *Rhay.* Also see: *People* vs. *Havel,* 134 Cal. app. 2d 218, 218, 285, p. 2d 317 220; wherein it was held in the pertinent part as follows:

> "It is a fundamental principle that persons charged with and convicted of public crimes are entitled to the services of their attorneys at all stages of the proceedings, and this includes arraignment for final judgement when defendants are asked if they have any legal cause to show why judgment should not be pronounced. A defendant does have certain substantial rights at that time and it may be only a trained legal mind that would understand the significance of this querry."

III

Additionally, in *State* vs. *Shannon*, 60 Wn. 2d. 883, 889, 376, p.2d 646; This Court held and stated:

> "Imposition of sentence, following revocation of probation, particularly in felony cases, is part of the criminal prosecution within the Constitution Art.1, section 22 (Amendment 10) at which time a defendant is entitled to be represented by counsel. In re *McClintook* vs. *Rhay*, 52 Wn. 2d 615, 328, p.2d 369; in re *Levi*, 29 Cal. 2d 41; 244 p. 2d 403.

IV

Therefore, petitioner submits that in the case at bar the petitioner appeared before the trial court for arraignment for the imposition of judgmnt and sentence, unaccompanied by counsel to represent him, contrary to his constitutional rights under Art. 1. section 22 (amendment 10) as construed by this Court in *State* vs. *Shannon. Supra.*

Wherefore, petitioner respectfully submits that his criminal cause should be remanded to the Superior Court of the State of Washington for Spokane County with directions to vacate the judgment and sentence and return him to the said Superior Court for rearraignment for the imposition of judgment and sentence, at which time he should have counsel represent him, and that judgment and sentence be re-entered *Nunc Pro Tunc.*

[fol. 3] Respectfully Submitted, Jerry Douglas Mempa, W.S.P. #118347, P.O. Box 520, Walla Walla, Washington 99362.

STATE OF WASHINGTON,
County of Walla Walla, ss:

JERRY DOUGLAS MEMPA, being first duly sworn on oath, deposes and says: That he is at all time the petitioner named in the foregoing application for a Writ of Habeas Corpus; and that he has read and signed same and knows the contents thereof, and same are true.

Jerry Douglas Mempa.

Subscribed and Sworn to before me this ~~15~~ 9 day of ~~July,~~ Dec, 1965.

Raymond C. Bannister, Notary Public in and for the State of Washington, residing in Walla Walla, County.

[SEAL]

[fol. 4] Affidavit of Service by Mailing, Omitted in printing.

[fol. 5] Motion for Leave to Proceed in Forma Pauperis, Omitted in printing.

[fol. 6] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38470

[Title omitted]

RETURN AND ANSWER—Sworn to October 29, 1965

Comes now the respondent, B. J. Rhay, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, by and through his attorneys, John J. O'Connell, Attorney General of the State of Washington, and Lee D. Rickabaugh, Assistant Attorney General, and for return to the application of Jerry Douglas Mempa for a writ of habeas corpus alleges:

I

That the respondent, B. J. Rhay, is the duly appointed, qualified and acting Superintendent of the Washington State Penitentiary at Walla Walla, Washington, a state correctional institution for the confinement and rehabilitation of convicted felons sentenced and committed thereto by the Superior Courts of the State of Washington.

II

That the respondent, B. J. Rhay, as Superintendent of the Washington State Penitentiary has in his custody and confinement in the Washington State Penitentiary the petitioner, Jerry Douglas Mempa, pursuant to and in accordance with judgment and sentence and warrant of commitment rendered by the Superior Court of the State of Washington for Spokane County on October 23, 1959, under that [fol. 7] court's Cause No. 16277, wherein it appears that the petitioner was convicted of the crime of "violating section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding", and sentenced to a maximum term of confinement of not more than ten years. That certified copies of the said judgment and sentence and warrant of commitment are attached hereto and by this reference incorporated herein as though fully set forth.

Further and for Answer, the respondent denies each and

every material allegation and thing contained in the application of Jerry Douglas Mempa for a writ of habeas corpus except such allegations thereof as may hereinafter be affirmatively admitted in the respondent's answer and defense.

Further and by way of Affirmative Answer and Affirmative Defense respondent alleges:

I

That the petitioner was charged by Information filed in the Superior Court of the State of Washington for Spokane County, under that court's Cause No. 16277, with having committed the crime of "violating section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding", as more fully set forth and alleged therein, and that a certified copy of said Information s attached hereto and by this reference incorporated herein as though fully set forth.

II

That thereafter and on or about the 17th day of June, 1959, the petitioner was arraigned before the said Spokane County Superior Court being at that time accompanied by and represented by his attorney, Willard Roe, a duly licensed and practicing attorney in the State of Washington, residing in Spokane County, and, having been fully advised of his rights, the petitioner entered a plea of Guilty to the [fol. 8] said charge of "violating section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding", and was at that time placed on probation for a period of two years. That a certified copy of the said Order of Probation is attached hereto and by this reference incorporated herein as though fully set forth. Thereafter, and on or about October 23, 1959, the petitioner having violated the terms of his probation, the said probation was revoked on said date and the said petitioner was sentenced by the said court, as aforesaid, to a maximum term of imprisonment of not more than ten years, and that the petitioner herein is properly in the custody of the respondent pursuant to said judgment and sentence and that the maximum term of imprisonment thereon has not expired. That certified copies of the Notice of Revocation of Probation and Order Revoking Probation are attached hereto and

by this reference incorporated herein as though fully set forth.

III

That attached hereto and by this reference incorporated herein as though fully set forth is an affidavit of Richard J. Schroeder, Deputy Prosecuting Attorney for Spokane County, which said affidavit is so attached and incorporated herein for the purpose of answering certain of the contentions made by the petitioner in his application for writ of habeas corpus.

Wherefore, the respondent having made his return and fully answered the application of Jerry Douglas Mempa for a writ of habeas corpus prays that the same be denied and that the proceedings be dismissed.

Respectfully submitted, John J. O'Connell, Attorney General. Lee D. Rickabaugh, Assistant Attorney General.

[fol. 9] *Duly sworn to by Lee D. Rickabaugh, jurat omitted in printing.*

[fol. 10] ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff,

vs.

JERRY D. MEMPA, Defendant.

INFORMATION—Filed May 26, 1959
(RCW 9.54.020)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant, Jerry D. Mempa, with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as "Joy-riding," committed as follows:

That the said defendant, Jerry D. Mempa, in the County of Spokane, State of Washington, on or about the 25th day of April, 1959, then and there being, did then and there willfully, unlawfully, and feloniously, without the permission of the owner or person entitled to possession thereof, intentionally take and drive away a motor vehicle, to-wit: a 1956 Chevrolet automobile, Washington License No. CBS-454, the property of Bert Sampson.

John J. Lally, Prosecuting Attorney in and for Spokane County, Washington. By Howard A. Anderson, Deputy.

STATE OF WASHINGTON,
County of Spokane, ss:

HOWARD A. ANDERSON, being first duly sworn on oath, deposes and says: That the above and foregoing information is true as he verily believes.

Howard A. Anderson.

Subscribed and sworn to before me this 26th day of May, 1959.

[Illegible], Deputy County Clerk.

[File endorsement omitted.]

[fol. 11] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR COUNTY OF SPOKANE.

No. 16277

STATE OF WASHINGTON, Plaintiff,

v.

JERRY D. MEMPA, Defendant.

Transcript of Proceedings, June 17, 1959

Be it Remembered:

That the above entitled cause came on for hearing on the 17th day of June, 1959, before the Honorable Louis F. Bunge, Judge of the Superior Court of the State of Washington, in and for the County of Spokane, Washington; the plaintiff being represented by Howard A. Anderson, Deputy Prosecuting Attorney for Spokane County, Washington; [fol. 12] the defendant being personally present and being represented by Willard J. Roe, his attorney; and both sides having announced that they were ready, the following proceedings were had, to wit:

Mr. Anderson: If the Court please, this is a matter, State of Washington v. Jerry D. Mempa, Superior Court No. 16277. The defendant is present in court at this time. He is represented by his attorney, Mr. Willard Roe, and we are here for the purpose of an arraignment.

The Court: Is that correct, Mr. Roe? You are here for the purpose of an arraignment?

Mr. Roe: Yes, your Honor.

Mr. Anderson: Is your true and correct name Jerry D. Mempa?

Mr. Mempa: Yes.

Mr. Anderson: Mr. Roe, you have received a copy of this information?

Mr. Roe: I have.

Mr. Anderson: Jerry D. Mempa, has the Deputy Sheriff read the warrant to you?

Mr. Mempa: Yes.

Mr. Anderson: Jerry D. Mempa, you are charged by

complaint filed in this court with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as "Joy-riding," the charging part of the information reading as follows: That you, "Jerry D. Mempa, in the County of Spokane, State of Washington, on or about the 25th day of April, 1959, then and there being, did then and there willfully, unlawfully, and feloniously, without the permission of the owner or person [fol. 13] entitled to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, Washington License No. CBS-454, the property of Bert Sampson."

The Court: You have 24 hours within which to enter a plea. Do you want to plead now or wait the 24 hours?

Mr. Mempa: Plead now.

The Court: How old are you, Jerry?

Mr. Mempa: Seventeen.

The Court: When will you be eighteen?

Mr. Mempa: Next May.

Mr. Roe: May 14th.

The Court: You have just turned seventeen, then?

Mr. Mempa: Yes.

The Court: Where is your home?

Mr. Mempa: Spokane.

The Court: Are your parents here in court?

Mr. Mempa: Yes.

The Court: What is your plea to the crime of joy-riding as just read to you by the deputy sheriff—guilty or not guilty?

Mr. Mempa: It's guilty.

The Court: All right. You may be seated.

Mr. Anderson: If the Court please, the record for the defendant, Jerry Mempa, as a juvenile, in accordance with what Jerry Mempa has stated to me, on December 19, 1955, at a time when he was thirteen years of age, was before the juvenile officers for burglary. At that time he was detained one week in the juvenile home, and placed on an official probation.

When he was 14 years of age, on April 9, 1956, he was before the juvenile court for a burglary and malicious [fol. 14] vandalism, and at that time, on April 13, 1956, he was placed in the State Training School at the Green Hill Academy, in Chehalis, Washington. He remained

there until December 24, 1957, when he was released to his parents.

On February 13, 1958, he was found with wires in his possession that were commonly used to "hot-wire" automobiles. He was placed in the detention home because of this, and on that evening or the following day, there was an attempted break-out from the detention home. Jerry Mempa was one of the parties; however, he states it wasn't his idea or plan, but he had agreed to participate in it. As a result of this conduct, on February 14, 1958, he was returned to the Green Hill Academy in Chehalis, Washington.

On March 24, 1958, because of a riot that had occurred at the Academy, the school authorities or officers refused to keep Jerry Mempa there any longer, and he was returned to Spokane County. At that time, in March of 1958, he was sent to Eastern State Hospital on petition, for a psychopathic delinquent. He was transferred to the Diagnostic Center at Fort Worden, Washington, where he remained approximately ten days, and then he was transferred to Western State Hospital. The authorities at Western State Hospital were of the opinion that he was a psychopathic delinquent, and he was returned to Spokane County for the authorities to take what action they felt was necessary.

A petition was then filed placing him for observation again at Eastern State Hospital as a possible psychopathic [fol. 15] delinquent. The staff at Eastern State Hospital felt that he was not a psychopathic delinquent, and this petition was then dismissed and Jerry Mempa was returned to his home in Spokane.

As he stated, he is seventeen years of age. He was born in Butte, Montana, on May 14, 1942. He has a fourteen-year-old brother who is a student at North Central High School. Jerry Mempa was raised by his grandparents until 1952, at which time he left. He then lived with his mother and his stepfather; they reside at 2518 East Trent. His stepfather is a barber. As far as his education is concerned, he didn't quite finish the eighth grade.

As to the circumstances of this particular case, your Honor, on the evening of April 24, 1958, David Grant and Jerry Mempa were together. David Grant is also a juvenile boy—he has not reached eighteen. The two of them went to Al's Auto Sales, at East 3108 Sprague. Now, the stories

are a little conflicting as to just what happened, and David Grant states that Jerry Mempa had a ring of keys, and that he used one of these keys in a 1953 Chevrolet, and that he drove the Chevrolet away and David Grant rode in the car with the defendant. Jerry Mempa states that David Grant was the person that had the ring of keys, and that David Grant drove this car away, and that Jerry Mempa then got in. At any rate, the two boys admit that they both drove this 1953 Chevrolet, they both rode in it, it was taken without permission. During the course of the evening, at approximately 11:00 p.m., they stopped by the [fol. 16] home of Charles Dickerson, who lives at East 1904 Hartson, and Charles Dickerson, David Grant and Jerry Mempa then drove the car around the southeast section of town until it finally ran out of gas in the 1900 block on East 6th.

At that time the car was abandoned and the hub caps and fender skirts were taken from this car and placed in the garage of a relative of Charles Dickerson.

The following evening—now, this is the charge that has been filed against the defendant—on April the 25th of this year, Jerry Mempa and David Grant both rode and drove the 1956 Chevrolet that was taken from the garage at South 309 Haven. This is a private garage where the car was taken. Again the stories are a little bit in conflict. Jerry Mempa states that David Grant came to Mempa's home in this car and stated that it was a car that belonged to a relative of his, and they then drove in it, Jerry Mempa had not yet driven this car and later on found out that the car had been taken without permission because when Grant would see a policeman or an officer, he would immediately turn and go on some side street. David Grant states that Jerry Mempa—again using this ring of keys, that he had went into the garage at this address and the key fit this 1956 Chevrolet and that they then drove it. This car was driven during the evening of April 25th of this year by both boys, Jerry Mempa and David Grant. It was then parked near a park. The following day, on April 26th, both boys, Jerry Mempa and David Grant, returned to the car and they drove the car that day until the transmission [fol. 17] on this 1956 Chevrolet finally gave out. Jerry Mempa states that he drove it for about two miles in reverse, and then parked it.

The people at South 308 Haven informed the police that they thought a neighbor boy might have had something to do with that, and that neighbor was David Grant. He was picked up by the police department, questioned, and he admitted everything that occurred pertaining to these cars. He was sent by the juvenile court to the Green Hill Academy at Chehalis, Washington.

At approximately 7:00 p.m. April 28th of this year Jerry Mempa, the defendant, was picked up; he was placed in the juvenile detention home. His officer, Mr. Jim Davis, was talking to him on April 29th of this year. As Mr. Davis was taking Jerry Mempa back to where he was being detained, the defendant broke away from the officer and ran out of the building and fled that particular area. The juvenile court remanded this particular case to the prosecutor's office on May 1st of this year, and then on May the 18th of this year, Jerry Mempa, accompanied by his stepfather, Mr. Dickerson, came in on their own to the Spokane County Sheriff's office and he turned himself in at that time. He has been in custody ever since.

The Court: Where at?

Mr. Anderson: In the Spokane County jail, your Honor.

The Court: Mr. Roe?

Mr. Roe: I think your Honor may have had some previous acquaintance with this case.

The Court: Quite a little.

[fol. 18] Mr. Roe: I was appointed to defend this man by Judge Kelly after he had been in jail some time, and statements had been taken from him and also the other participants, and it's clear beyond all reasonable doubt, as far as I'm concerned, that this crime was committed and this man is guilty. It's a sorry recital, obviously, of this boy's previous three or four years. The only one bright light, and one that I think should commend itself to the Court, is the fact that he gave himself up voluntarily on May 18th, after he successfully made an escape from the juvenile, and he has been in jail now for a month today.

He is a product of a broken home, he has been knocked about from early infancy, he hasn't even finished the eighth grade. At the time he first got into trouble—I believe this is correct, though Mr. Anderson can correct me if it's wrong—it was his participation in the burglary of a surplus store. The others were given probation and I believe one left the

state, but only Jerry was sent to Chehalis, where he served eighteen months or so.

He has been pushed around even by the state, from one institution to another, from Chehalis to Western State to Eastern State; he has been knocked about by them. He hasn't been given a real break by the state yet. Even in this last deal, which is the subject of this charge today, your Honor, I believe from my limited information that of the three boys, David Grant, Charles Dickerson and Jerry Mempa, the only one before the Superior Court is Jerry Mempa. I believe that Charles Dickerson—who is no relation to the stepfather, I might add—was given proba-
[fol. 19] tion. I believe that David Grant was sent back to Chehalis.

Now I know this poses a hard task and a difficult task for the court. I suppose an easy way would be to send him to Monroe. The fact that he is here in Superior Court indicates the gravity of the situation, but nevertheless this boy is not eighteen. He is just barely seventeen; he was sixteen when this occurred. If there is ever a chance to redeem him for society, or to make him indebted to society, it is now. This is the very last opportunity, it would appear to me. I don't know—I of course don't know the causes, and I doubt if anyone knows certainly the causes, why this boy is in trouble. His mother is here, very concerned, and his stepfather took time off from work to be here. He has another brother, age fourteen, who is a student at North Central High School and is making average grades; and so the home life must be acceptable enough. Not presuming at all upon the Court, but I have attempted to see what we could find for him in the way of work, if he got out of jail or if he was given some sentence in the county jail. It is difficult to find a job for a boy of this record and also his education. I have talked to a Richard Montoya, who runs the Dishman Body and Fender Shop and does tire recapping. He has indicated he would be interested in putting the boy to work. He can't promise a job right now, but he will later, and he can't pay much, but he could pay something ,to give him something to do. He has never had a real job.

I have also talked to Mr. Paul Cooney, the attorney who
[fol. 20] previously represented Mr. Mempa. Mr. Cooney is familiar with this, and of course he has tried to get a

job for the boy, but it didn't pan out, but he has conferred with some of his clients in a light manufacturing enterprise, and they would be willing to take a chance on the boy. It depends on orders given, but there is a possibility around August 1st that there might be a job available there.

I think the Court should look at the case in this light, particularly since you have a previous acquaintance with this matter. The role of a judge in assessing the punishment in a trial, of course, has many factors. One is, of course, the satisfaction of the demands of the state. He has already served more time in detention than many men who have committed much worse crimes than this. If he goes, I suppose that the chip on the shoulder that some of them come out with will be further aggravated. The only hope that I see is to make him realize that society is giving him a break, and that he is indebted to the Court or to society when they did not take advantage of him when they could, and that is by possibly giving him a chance now, so that he will have an understanding and a need to repay society, and possibly with that approach this boy can be saved. Certainly I think this is probably the last time. He has served a month in the county jail. An appropriate term in the county jail, if there was further work which was provided, I think could satisfy the demands of the state and at the same time preserve this young boy, still in his tender youth, for society. I ask that the Court look upon it in that light.

[fol. 21] The Court: Is there anything you want to say, Mr. Anderson?

Mr. Anderson: No, your Honor.

The Court: Well, gentlemen, the talk that you have made here, Mr. Roe, is almost similar to the one that the other counsel that you mentioned, Mr. Cooney, made. Every lawyer that has had any touch with this case has been convinced, honestly, as I think you are, that something went wrong with this boy somewhere, that he never recognized any of the responsibilities of citizenship. I have been impressed, the previous times that he has appeared before me when I was sitting in juvenile, that his father-in-law, or his stepfather was very kindly disposed to him. I think his parents both wanted this boy to get along, and were willing to do anything they could do, but apparently what they could do has been very short of what was required

in his case. He has a genius for stealing cars. He will come up with a mechanism that he can cross-wire these cars, and he has a positive genius for that. Then he seems to have a genius for getting everybody that has tried to help him charged with the duty of taking care of him and getting entrapped with him. I don't know why—I haven't been in these places—but they don't want him at Green Hill, they don't want him at Medical Lake, and they don't want him at Western State. I don't know why, but it's true. I am inclined to agree with you, Mr. Roe, that this is a crossroads for this boy, this is a critical period in his life, but what I am disturbed by is that we, in juvenile, have given his parents and everybody else that could be reached a chance to do something with him, and everybody [fol. 22] has failed, and society keeps on suffering from his misdeeds. I venture to say that when he is out of the institution again, it won't take him ten days to get back in. They will pick him up somewhere—that's what concerns me. Have you any program or anything in mind? Have you tried to impress him with the necessity of abiding by the laws of society, Mr. Roe—that would help us in any way that would offer some hope to get him to realize his position?

Mr. Roe: I have, your Honor, and I have told him that he can't beat society.

The Court: Have you convinced him?

Mr. Roe: Well, he appears convinced to me, in jail, but I can't guarantee that my suggestion will stick. It is not pleasant in the county jail. I think—now is the first time he has been in a real jail, and possibly leaving him there for a few months—that's twice as hard as serving any place else. Maybe we can have some job available, maybe, during the summer, with Mr. Cooney or this tire recap under strict supervision, with a good dose of county jail time. Your Honor, I think it is the only hope. If he is ordered to the reformatory, I am afraid he is gone. Sixteen when this happened—or this happened before the age of sixteen—he is not too old to be turned.

The Court: Mr. Davis has a way with boys that is quite effective, and he did everything in the world that he could with this young man, and there just seems no influence of any kind that could reach him that I know of. After serving three years, from 1935 to 1938, in the position of Chairman

[fol. 23] of the Parole Board, I am convinced of something that an old parole officer of many years of experience told me, that the hardest time, as far as pure punishment is concerned, that a prisoner serves is either in the county jail or a penitentiary in the first thirty days that he is there. After that time, he becomes case-hardened, he doesn't have the same reaction to his punishment and there's nothing gained except as far as society is concerned. But he bothers me very much. For that time he was in, he was falsifying with respect to how he got the new mechanism that he had, and he seems to be able to draw the boys to him, which is distressing, in these escapes. Now, I realize there is a sort of code among these delinquents where they say they can steal five cars before anything serious will happen to them, but most of those boys, we can send them over to the training school and they come back and don't get into any more trouble, and this boy does have trouble. I have had letters from psychiatrists at our institutions; they have examined him; they can't convince themselves that he is insane; he is just apparently delinquent, and that's all.

You may stand up. Is there anything you want to say on your own behalf before the judgment of the Court is pronounced in this case?

Mr. Mempa: No sir.

The Court: Why is it, Jerry, that you won't listen to reason about your troubles?

Mr. Mempa: I listen.

The Court: We can't hear you.

Mr. Mempa: I said I listen.

The Court: Well, you never listened to your stepfather, did you?

[fol. 24] Mr. Mempa: No.

The Court: He always treated you all right, didn't he?

Mr. Mempa: Yes.

The Court: Your mother provided a home for you, you had an opportunity to go to school, but you missed it every time, isn't that right?

Mr. Mempa. Yes sir.

The Court: And your mother has always been kind to you, hasn't she?

Mr. Mempa: Yes.

The Court: They don't want you to do this sort of thing. Now, you made some promises to Mr. Cooney, your other

lawyer, didn't you? You told him you were going to stay out of trouble—didn't you say that to him?

Mr. Mempa: Yes.

The Court: What hope have I, what assurance have I to turn you loose on society once again?

Mr. Mempa: Well, I think I would make it this time.

The Court: You think you would make good?

Mr. Mempa: Yes.

The Court: How far did you get in school?

Mr. Mempa: I didn't get quite through the eighth grade.

The Court. What was the reason? Were you getting along all right in the eighth grade when you were pulled in the last time?

Mr. Mempa: Yes.

The Court: Why did you run from Mr. Davis over at the juvenile?

Mr. Mempa: Well, he said he was going to remand me to Superior Court, and told me the sentence would probably be ten years, I would probably go to Monroe.

[fol. 25] The Court: What justification would I have now to let you go after you have served another thirty days in the county jail? Do you think you have learned something out of this?

Mr. Mempa: Yes.

The Court: Do you think you can resist from now on, if you served another thirty days down there, could you resist and steer another course now?

Mr. Mempa: Yes.

The Court: You don't say that very convincingly, young man.

Mr. Mempa: I could.

The Court: Anything else you want to say?

Mr. Mempa: No.

The Court: Very well. It is the further judgment of the Court that you be confined in the institution for a maximum period of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now that when you are released you are going to be under observation not of the juvenile officers, but of the state parole officers. Those men know their business. They are kindly disposed. They will be there for the purpose of seeing that you don't get back here again. Take advantage of this, or you are

going to be back here. You are absolutely on your own now. Mr. Roe can't help you, and no one else can help you, and if you steal a car, you are going to Monroe and you are going to stay there.

I would think that you would realize that this is a real opportunity, and that you would behave yourself from now on. [fol. 26] Mr. Anderson: Your Honor, actually what you are doing is placing the defendant on probation?

The Court: Yes, that is the effect of it. Except that he has served 15 days, I could make it for a period of two years. I should have done that.

Mr. Roe, will you undertake to tell him once more for his own behalf that it is up to him from here on, now, that he become a good citizen.

Mr. Roe: Yes sir, I will.

The Court: This is a probationary order, Mr. Roe, with the exception of his serving thirty days. I think it's regrettable that he has not finished his schooling, at least his eighth grade, and if there's any hope of getting him out here to the Industrial School, I would like to see him go. I have signed the order.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 27] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

No. 16277

STATE OF WASHINGTON, Plaintiff,

vs.

JERRY D. MEMPA, Defendant.

ORDER OF PROBATION—June 17, 1959

This matter coming on regularly for hearing on this 17th day of June, 1959, defendant appearing in person, and (being represented by Willard Roe, Attorney), and the State of Washington being represented by Howard A. Anderson, Deputy Prosecuting Attorney and the defendant having entered his plea of guilty to the charge of violating Sec. 9.54.020, RCW, commonly known as "Joy-riding" as contained in the information, and the Court having found the defendant guilty, and having heard the circumstances of the case and being fully advised in the premises, and it appearing to the Court that the defendant has never before been convicted of any crime and appears to be industrious, it is by the Court

Ordered, Adjudged and Decreed, that the defendant, Jerry D. Mempa, be placed on probation for a term of two Years, and until the further order of the Court, as provided by the Probation Act, and to make such reports as required and be under the supervision of the State Parole Officer during the period of his probation.

It is Further Ordered that as a condition of probation the defendant will be confined in the Spokane County Jail for a period of thirty days.

Done in open Court on this 17th day of June, 1959.

Louis F. Bunge, Judge.

Presented by Howard A. Anderson, Deputy Prosecuting attorney.

CERTIFICATE

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the Order of Probation, as the same appears on file and of record in my office, and I further certify that said Order of Probation was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this — day of ——, 19—.

——, ——, Clerk. ——, ——, Deputy.

Order of Probation.

[File endorsement omitted.]

[fol. 28] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff,

vs.

JERRY D. MEMPA, Defendant.

NOTICE—Filed October 23, 1959

To: JERRY D. MEMPA, defendant above named.

You will please take notice that the undersigned Deputy Prosecuting Attorney in and for Spokane County, State of Washington, will submit to the Honorable Louis F. Bunge, Judge of the Superior Court of the State of Washington, in and for the County of Spokane, on the 23rd day of October, 1959, at nine-thirty o'clock A.M., in the courtroom of said Judge in the Spokane County Courthouse at Spokane, Washington, a motion for an order revoking the probation in the above-entitled matter, a copy of which motion is hereto attached, the said defendant having been placed on probation for a period of two years on the 17th day of June, 1959, after his plea of guilty of the crime of Violating Section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding on the 17th day of June, 1959, by the said Honorable Louis F. Bunge.

Dated at Spokane, Washington, this 23rd day of October, 1959.

Howard A. Anderson, Deputy Prosecuting Attorney.

Copy of above notice and motion for order to revoke probation received this 9th day of October, 1959.

Jerry Mempa, Defendant.

[File endorsement omitted.]

[fol. 29] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff,

v.

JERRY D. MEMPA, Defendant.

ORDER REVOKING PROBATION—October 23, 1959

This cause coming on regularly for hearing before the Court on the motion of the Prosecuting Attorney in and for Spokane County, State of Washington, by his deputy Howard A. Anderson, for an order revoking the probation entered herein on the 17th day of June, 1959, and the defendant having been duly served with notice of said hearing on said motion to revoke, and said defendant appearing in person, and the Court having examined the records and files herein and having heard the evidence and the admissions of the defendant, the Court finds that the defendant has violated the terms of his probation in that on the evening of September 15, 1959, the defendant, together with a juvenile, broke and entered the building of Mark's Auto Sales, a used car lot located at 2814 East Sprague Avenue, in Spokane, Washington, and took therefrom a television set, a radio and three rifles; now therefore,

It is Ordered that the Order of Probation entered in this cause on June 17, 1959, be and the same is hereby revoked and set aside, and that judgment and sentence be imposed upon the defendant upon his plea of guilty heretofore entered.

Done in Open Court in the presence of the defendant, Jerry D. Mempa, on this 23rd day of October, 1959.

Louis F. Bunge, Judge.

Presented by: (Copy Illegible.)

[fol. 30] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff,

v.

JERRY D. MEMPA, Defendant.

Transcript of Hearing on Revocation of Probation, October 23, 1959

Before: Hon. LOUIS F. BUNGE, Judge.

APPEARANCES:

Mr. Howard A. Anderson, Deputy Prosecuting Attorney, Spokane County Courthouse Spokane, Washington.

[fol. 31] The Court: What number of case do you have this filed in?

Mr. Anderson: 16277, Your Honor. If Your Honor please, this is the time that has been set to have the matter of the State of Washington vs. Jerry D. Mempa, Superior Court No. 16277, brought before the Court on a motion for an order revoking the defendant's probation. The defendant, Jerry D. Mempa, is present in Court, Your Honor, and his stepfather, Mr. Dickerson, is also present in Court.

Your true and correct name is Jerry D. Mempa?

A. Yes.

Q. And how old are you now?

A. 17.

Q. Are you the same Jerry D. Mempa that was placed on probation by this Court after having entered a plea of guilty to the crime of joy-riding on June 17?

A. Yes.

Q. And at that time is it correct that you were placed on probation and as a condition of the probation you were required to be confined 30 days in the Spokane County Jail?

A. Yes.

Q. Now, Jerry Mempa, have you received notice of this particular hearing and a copy of the motion for an order [fol. 32] revoking your probation, which was served on you the 9th of October, '59?

A. Yes.

Q. You understand the purpose of this motion before the Court?

A. Yes.

Q. You realize that if the court revokes your probation that you could be sent to the Washington State Reformatory?

A. Yes.

Q. And you wish to proceed with this matter before the Court at this time?

A. Yes.

The Court: Ask him if the statements in the affidavit are true, whether he was involved in the burglary that appears in the record.

Q. Jerry Mempa, you have read the affidavit, have you, attached to this motion?

A. Yes.

Q. And where it is stated that on the evening of September 15, 1959, that you were in the presence of a juvenile boy, David Grant; that the two of you went to Mark's Auto Sales, a used car lot located at 2814 East Sprague Avenue, and that this building was locked and no one was there; that you and the juvenile boy, David Grant, gained entry [fol. 33] into this building by breaking a side window and David Grant crawled through the window and opened the back door; that you then entered the back door; that after David Grant had failed to find any money in the building, that you and he took a television set, a radio, and three rifles from this building on this particular evening that I stated, on September 15, 1959; is that correct?

A. Yes.

Q. Is that true?

A. Yes.

The Court: Hand up the papers, please.

(Does so)

Mr. Anderson: I would state, Your Honor, to the Court,

Mr. William Weaver, the defendant's probation officer, is present in Court if the Court wishes to have testimony.

The Court: Oh, put him on and let him tell he is the one that made the report in this case.

Mr. Anderson: Yes, Your Honor.

WILLIAM D. WEAVER called as a witness, being first duly sworn according to law, was then examined upon his oath and testified as follows:

[fol.34] The Court: Just the facts in connection with the burglary.

Q. State your name, please.

A. William D. Weaver.

Q. What is your address, sir?

A. 1215 East 3rd, Spokane, Washington.

Q. What is your profession?

A. Parole and Probation Officer, State of Washington.

Q. As stated in the affidavit, have you had the supervision of the defendant before the Court, Jerry D. Mempa?

A. Yes.

The Court: Just make it short and sweet. You made the report in this connection and you state that the boy denied breaking into the place out there, wherever it was?

A. That is correct.

The Court: And he did so deny it?

A. Yes.

The Court: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking the probation that I previously granted you. Now, stand up, Jerry. Probation having been revoked, it is the further judgment of the Court that you be confined in the Washington State Reformatory for a maximum period of ten (10) years. The Parole Board will fix the time you stay there. [fol. 35] I'm going to recommend a year for you so you can—let me make a suggestion to you: We've had a lot of trouble with you, we've tried in every way in the world to stabilize you if we could and we don't seem to be able

to do it and I'm sorry that you weren't able to take advantage of the probation that was previously granted to you, but this seems to be the only answer that I can find for you, and think it over while you are at Monroe and you ask the Warden there to help you to learn some kind of a job so you can take care of yourself and then don't get into more trouble because if you do you are going to spend the rest of your life in these institutions. Don't do that. On the face of things you appear to be a fine boy, and you are a clean looking boy at least, but you have been in to an awful lot of trouble and you have got to get right with yourself on that trouble. The one that takes you out to commit a burglary is yourself. You have got to answer, and you are the one that has been responsible. You may be seated.

Mr. Anderson, when you write the report in this connection, will you state the (S PW AO EU R/ H EUF T) ((unable to decipher)) to the Warden at the Reformatory?

Mr. Anderson: Yes, Your Honor.

The Court: And state the effort that we made to have [fol. 36] him committed as a psychopathic delinquent. State the (TK EU/ O PB/ T PH E PB T) ((unable to decipher)) phase of it that is presented and tell him that it is very important that this boy learn some kind of a trade there so that when he goes out into the world that he may be able to take care of himself and his extreme youthfulness is a fact and is important. Will you do that, please?

Mr. Anderson: Yes, Your Honor, I certainly will.

The Court: You filed your motion for revocation in the wrong file. Will you check on it to see which is right.

Mr. Anderson: Yes, Your Honor.

The Court: You had originally the psychopatic file—that the papers are in this correct file at least.

Mr. Anderson: Yes, Your Honor.

[fol. 37] STATE OF WASHINGTON,
COUNTY OF SPOKANE, ss:

I, WAYNE C. LENHART, a Notary Public and Official Court Reporter, sitting in Department #4 of the Superior Courts for Spokane County,

Do Hereby Certify:

That I was called upon to type up the notes of Harry Malcom, now deceased, the then Court Reporter for Judge Bunge, also now deceased, by Deputy Prosecuting Attorney Richard Schroeder in November, 1965; the notes having been taken at a Revocation of Probation Hearing on October 23, 1959, before the Honorable LOUIS F. BUNGE.

That I typed up these notes to the best of my ability, that there were portions I found impossible to read, that I checked these portions with Mrs. Ann Prideaux, also an Official Court Reporter for Spokane County, that together there are still portions neither of us can decipher, and that these portions are shown in the transcript as such. That the unreadable portions refer to the Prosecutor's Statement and that this statement is included for reference.

Witness my hand and seal this 26th day of November, 1965.

Wayne C. Lenhart, Notary Public in and for the State of Washington, residing at Spokane, Wash.

Certificate of Notary:

[fols. 38-40] ATTACHMENT TO HEARING OF OCTOBER 23, 1959

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff,

v.

JERRY D. MEMPA, Defendant.

Sentenced on October 23, 1959 by Judge Louis F. Bunge to serve not more than 10 years in the Washington State Reformatory, upon revocation on that date of the probation granted defendant on June 17, 1959 for a period of two years after his plea of guilty that date of the crime of violation of RCW 9.54.020, commonly known as "Joy-riding".

Minimum sentence recommended:

By Judge, one year.

By Prosecuting Attorney, two years.

Statement of Prosecuting Attorney

Background:

Jerry D. Mempa, a white male, was born in Butte, Montana on May 14, 1942. At the time of the offense he was 17 years of age. He and his younger brother were raised by his grandparents until 1952, at which time the boys commenced living with their mother and stepfather in Spokane. The mother and stepfather are presently residing at 2518 East Third. The stepfather, Mr. William Dickerson, is a barber. Mempa did not complete his eighth grade education.

Circumstances of the Case:

On the evening of April 24th this year, a juvenile boy, David Grant, and Jerry Mempa went to Al's Auto Sales, located at East 3108 Sprague Avenue in Spokane. They took a 1953 Chevrolet automobile without the permission of the owner. They were able to start the car by the use of a ring of automobile keys. Mempa states that Grant had the

ring of keys, and Grant states that Mempa was the one that had the ring of keys. This car was driven around Spokane, and later in the evening the two boys stopped this car in front of Charles Dickerson's home at East 1924 Hartson. The three juvenile boys then continued to drive the car around the Spokane area until it ran out of gas at 1911 East 6th. They then took the hub caps and fender skirts off the car and abandoned it at that point.

On the evening of April 25th, David Grant and Jerry Mempa took and drove a 1956 Chevrolet automobile without the permission of the owner. This car was taken from a private garage at South 308 Haven. The owners of the car were neighbors of David Grant. This car was driven around the Spokane area and then parked at Underhill Park. The following evening Mempa and Grant returned to the car and again drove it around the Spokane area. Mrs. Sampson, the owner of the 1956 automobile, reported the theft of her car to the police. She advised the police at that time that she thought David Grant had something to do with the theft of her car. David Grant was picked up and questioned, and at that time he related what had happened, and also advised the police of Mempa's and Dickerson's participation in the events that took place on April 24th, 25th and 26th. Jerry Mempa was picked up by the police on the evening of April 28th. On April 29th, Mempa was in the Spokane Juvenile Detention Home in the custody of Juvenile Officer Gene Davis; on that day Mempa escaped from custody. The Juvenile Court remanded this case on May 1st. Mempa, accompanied by his stepfather, Mr. Dickerson, turned himself in to the Spokane County Sher-
[fol. 41] iff's office on May 18, 1959. At that time Mempa admitted his participation in the theft of the two mentioned cars. His story as to what had occurred was substantially the same as David Grant's. On June 17, 1959, Jerry Mempa, represented by his attorney, Mr. Willard Roe, entered a plea of guilty to the charge commonly known as "Joy-riding". On that day the Court placed the defendant on probation for a term of two years, and as a condition of said probation, the defendant was required to serve 30 days in the Spokane County Jail.

Jerry Mempa continued living with his mother and stepfather at 2518 East Third, Spokane, Washington. On the

evening of September 15, 1959, Jerry Mempa, in the company of David Grant, went to Mark's Auto Sales, a used car lot located at 2814 East Sprague Avenue in Spokane, Washington. At that particular time the building on this property was locked. Jerry Mempa states that David Grant broke a side window out of the Mark's Auto Sales building, and that David then crawled through the window and opened the back door. Mempa states that he entered the building through the back door, and at that time David Grant attempted in vain to find some money in the building. The defendant and Grant, when leaving the building, took a television set, a radio, and three rifles. Mempa states that the agreement was that he would get all of the money that was found in the building, and that Grant would take whatever property he wanted from the building. Jerry Mempa stated to the writer that the idea of breaking into this building came from David Grant.

Mempa further stated that subsequent to being placed on probation, he had attempted to find work and to hold a steady job, but had been unable to do so. On October 23, 1959, the defendant, Jerry Mempa, was taken before the Honorable Louis F. Bunge, Judge of the Spokane County Superior Court, on a motion to revoke the probation previously entered by the Court. At that time the defendant's stepfather, Mr. William Dickerson, was also present in court. The Court revoked the probation previously entered and entered a judgment sentencing the defendant to the Washington State Reformatory on the 23rd day of October, 1959. Judge Bunge specifically requested that the writer advise the Board of Prison Terms and Paroles that the defendant, during the time he is confined in the Reformatory, should be given every opportunity to learn a vocational trade. The Judge, after having heard the initial arraignment on the Joy-riding charge, was of the opinion that the greatest reason for Mempa's repeated violations of the law was because he is unable to obtain and hold a steady job.

Prior Record:

The defendant states that he has the following juvenile record: On December 19, 1955 the defendant was before the juvenile officers on a petition alleging burglary. He

was detained one week and placed on unofficial probation. On April 13, 1956 he was before the Juvenile Court on a petition alleging burglary and malicious vandalism. April 13th he was sent to the Green Hill Academy at Chehalis, Washington. On December 24, 1957 the defendant was released to his parents. On February 13, 1958, the defendant was found with wires in his possession which are commonly used for "hot-wiring" cars. He was placed in the Juvenile Detention Home. On that day the defendant and two other juveniles attempted an escape from the Home. A matron received quite serious injuries as a result of this attempted escape. Because of the possession of the wires and because of the attempted escape, the defendant was sent back to the State Training School at Chehalis. On March 24, 1958, the defendant was involved in a riot at the Green Hill Academy and the authorities refused to keep him any longer. In March, 1958, the defendant was sent to Eastern State Hospital for observation as a possible psychopathic delinquent. He was then sent to the diagnostic center at Fort Worden, Washington. The staff there sent him to Western State Hospital. It was the opinion of [fol. 42] the doctors at Western State Hospital that the defendant was a psychopathic delinquent. The defendant was then returned to the Spokane County Juvenile Court. The Juvenile Court in Spokane County referred the defendant's case to the local Prosecutor's office for appropriate action on October 17, 1958. The defendant was again sent to Eastern State Hospital for observation on a petition as a possible psychopathic delinquent. The defendant at that time was represented by Mr. Paul Cooney and a formal demand was made for a jury trial. After observing the defendant at Eastern State Hospital, the doctors concluded that he was not a psychopathic delinquent, and the petition was accordingly dismissed. The defendant was permitted to return to the custody of his parents.

Howard A. Anderson, Deputy Prosecuting Attorney

Approved:

Louis F. Bunge, Judge.

[fol. 43] ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SPOKANE COUNTY

No. 16277

STATE OF WASHINGTON, Plaintiff,

vs.

JERRY D. MEMPA, Defendant.

JUDGMENT AND SENTENCE
(Plea of Guilty)

This matter having come on regularly for hearing in open court on the 17th day of June, 1959, the defendant, Jerry D. Mempa, being represented at said time by Willard Roe, his attorney appearing, and the State of Washington then appearing by Howard A. Anderson, Deputy Prosecuting Attorney for Spokane county, and the information charging the defendant with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding, having been duly served upon and read to the Defendant, and the Court having ascertained the true name of the defendant, and having interrogated and informed him of the nature of the charge and that he might have one day's time in which to enter his plea, and having advised the Defendant that he was entitled to trial by jury, and to the services of an attorney and that the Court would appoint counsel for him at the expense of the county if he so desired and was without funds, and it appearing and the Court having been advised by the Defendant that he understood the nature of the charge and was ready and willing to enter his plea, and it appearing and the Court having determined that the Defendant is capable of and is exercising a free and rational choice, the Defendant was then arraigned and entered his plea of guilty to each crime charged in the Information. Whereupon, the defendant being asked if there were any causes that Judgment should not be pronounced and no sufficient cause being shown, and the Court and Defendant being fully advised in the premises,

It was on said June 17, 1959, Ordered, Adjudged and Decreed That said Defendant was guilty of the crime of Violating Section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding, as charged in the Information herein, and it appearing said defendant was placed on probation for a period of two years on June 17, 1959, and that said probation was revoked on October 23, 1959; now, therefore, it is hereby Ordered, Adjudged and Decreed that he shall be punished by confinement in the Washington State Reformatory for a term of not more than 10 years, and to pay the costs of this prosecution taxed at $———. The said sentence to run ———. The said Defendant is now hereby committed to the custody of the sheriff of aforesaid county to be detained and by him delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Signed this 23rd day of October, 1959, in the presence of said Defendant.

Louis F. Bunge, Judge.

CERTIFICATE

Entered Jour. No. ——. Page No. ——. Department No. ——, this — day of ——, 19—.

I, ———, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of ———, do hereby certify that the foregoing is a full, true and correct copy of the judgment, sentence, and commitment in this cause as the same appears of record in my office.

Witness my hand and seal of said Superior Court this — day of ——, 19—.

——, ——, County Clerk and Clerk of Superior Court.

[fol. 44] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff,

vs.

JERRY D. MEMPA, Defendant.

In the matter of the estate of Deceased. No. 16277

CERTIFICATE

STATE OF WASHINGTON,
County of Spokane, ss:

I, GEO. E. FALLQUIST, Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a true and correct copy of the Information; Order of Probation; Notice; Order Revoking Probation; Judgment and Sentence (plea of Guilty) in the above entitled cause, as the same now appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 4th day of October, 1965.

Geo. E. Fallquist, County Clerk. By (Copy Illegible), Deputy.

Certificate.

[fol. 45] ATTACHMENT TO RETURN AND ANSWER

WARRANT OF COMMITMENT

THE STATE OF WASHINGTON,
County of Spokane, ss:

The State of Washington, To the sheriff of Spokane county and to the Superintendent and officers in charge of the Washington State Reformatory at Monroe, Washington.

WHEREAS, Jerry D. Mempa, has been duly convicted in the Superior Court of the State of Washington, for said county, of the crime of Violating Section 9.54.020 of Revised Code of Washington, commonly known as "Joy-Riding", and judgment has been pronounced against him, and the Court having decreed that he be punished by not more than 10 years in the Washington State Reformatory, and pay the costs of this prosecution; all of which appears of record.

Now, this is to command you, The said sheriff, that you take and deliver the said defendant to the proper officers of said institution; and this is to command you, the superintendent and officers in charge of said institution, to receive the said defendant and to confine him at hard labor in said institution as provided by law for the aforesaid term and until such costs are paid, secured, or disposed of as by law provided, and these presents are your authority for the same, Herein Fail Not.

Witness the Honorable ——, Judge of said Superior Court, and the seal thereof, this — day of October, 1959.

Geo. E. Fallquist, County Clerk and Clerk of the Superior Court. By ——, ——, Deputy Clerk.

No. —

In the Superior Court of the State of Washington

For the County of

The State of Washington, Plaintiff,

vs.

——, ——, Defendant.

Judgment and Sentence of Warrant and Commitment

To —.

Filed in the office of the Clerk of Superior Court this — day of ——, 19—.

——, —— Clerk. By ——, ——, Deputy.

Recorded.

Vol. —. Page —.

The foregoing instrument is a correct copy of the original as the same appears of record.

Attest October 6th, 1965.

George E. Fallquist, County Clerk and Clerk of the Superior Court in and for the County of Spokane, State of Washington. By Harry Heingen, Deputy.

[fol. 46] ATTACHMENT TO RETURN AND ANSWER

AFFIDAVIT

STATE OF WASHINGTON,
County of Spokane, ss.

RICHARD J. SCHROEDER, being first duly sworn, on oath deposes and says: That he is a Deputy Proescuting Attorney for the County of Spokane, State of Washington, residing at Spokane; that he investigated the circumstances surrounding the hearing had before the Honorable Louis F. Bunge, Judge of the Superior Court of Spokane County, Washington, on October 23, 1959, at which hearing Judge Bunge revoked the probation which he had previously granted to the defendant, Jerry D. Mempa, on June 17, 1959; that he determined that the court reporter who recorded the hearing was one Harry Malcolm, who has since died, and further located the notes of Mr. Malcolm and had them read to him by Mr. Wayne Lenhart, a reporter at the present time for the Superior Court of Spokane County; that the stenotype notes indicate that Mr. Mempa was not represented by counsel at the hearing and that the only people present were Mr. Howard Anderson, the Deputy Prosecuting Attorney handling the case; Mr. William Weaver, the probation officer; and the defendant's stepfather, a Mr. Dickerson; that the notes further reflect that at no time during the hearing did the Court advise the defendant of any of his constitutional rights, including the right to have an attorney and be represented by counsel, and further there is no reference made to the fact that Mempa had been represented by counsel at the time that he pleaded guilty and was granted probation.

Richard J. Schroeder.

Subscribed and sworn to before me this 8th day of October, 1965.

Frances L. Lower, Notary Public in and for the State of Washington, residing at Spokane.

[fol. 47] THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38470

[Title Omitted]

REPLY TO RESPONDENTS RETURN AND ANSWER

To: the Chief Justice of the above entitled Court.

Reply

Comes now, Jerry Douglas Mempa, Petitioner, hereby Denies each and every material allegation Respondent makes in Respondents Return and Answer except what Petitioner Admits to be true.

Conclusion And Prayer

Petitioner asks that petition be granted as prayed for.

AFFIDAVIT

STATE OF WASHINGTON,

County of Walla Walla, ss:

Comes now, Jerry Douglas Mempa, affiant herein, who first being sworn to oath, desposes and says; That he acknowledges the contents herein, is competent to bear witness to same; That this petition is offered in good faith, having merit as such, as fact; affiant is of legal age, being a citizen of the United States and of the State of Washington, wherein he resides.

Jerry Douglas Mempa, Petitioner Pro se.

Subscribed and sworn to before me this 12 day of Nov., 1965.

Raymond C. Banister, Notary Public, in and for the State of Washington, residing in the county of Walla Walla.

[SEAL]

[fol. 48] Affidavit of Service by First Class Mailing, Omitted in printing.

[fol. 49] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38470
En Banc

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS OF JERRY DOUGLAS MEMPA, Petitioner,

v.

B. J. RHAY, Superintendent, Washington Penitentiary, Respondent.

OPINION—Filed June 23, 1966

This matter involves a petition for a writ of habeas corpus. The salient facts are: Petitioner, Jerry D. Mempa, was charged in the Superior Court for Spokane County with "joy-riding," as defined and prohibited by RCW 9.54.020. At his arraignment in that court, the petitioner was represented by court-appointed counsel, Willard S. Roe, then a prominent member of the Spokane Bar, and now a judge of the Spokane County Superior Court. Mempa, with the advice of counsel, entered a plea of guilty to the charge of "joy-riding." He was granted the privilege of probation status, and the imposition of the sentence was [fol. 50] deferred pursuant to the provisions of RCW 9.95.200 and 9.95.210. Thereafter (approximately two months later), the Spokane County Prosecutor's Office moved to have Mempa's probation status revoked for violation of the terms and conditions under which it had been granted. At a hearing in the Spokane County Superior Court, the petitioner's probation was revoked. Sentence (the statutory maximum term of imprisonment of ten years, subject, of course, to subsequent parole board action determining the actual period of institutional confinement or custody) was then imposed and, promptly thereafter, judgment, sentence, and an order of commitment were entered accordingly.

The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in

the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effective forthwith.[1] Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system.

[fol. 51] At this juncture some observations regarding the nature of probation—what it is and is not—may be helpful to an understanding of our decision herein denying Jerry D. Mempa's petition for a writ of habeas corpus. It should first be noted that probation is a very useful and flexible tool or technique of modern penal administration. In fact, few well-informed people would disagree respecting the desirability of the objectives of probation and its constructive potential as a modern penal device for the rehabilitation of criminal offenders. Probation permits special handling of carefully selected criminal offenders who have pleaded guilty, or have been convicted of committing an offense against society. Perhaps in one sense the significant characteristic of the probation device is that the person who is fortunate enough to qualify and to have been granted probation status is allowed to be at liberty in the community. However, the probationer's ostensible "liberty" is somewhat misleading in that he is actually under probation supervision. Thus, while the probationer is not confined to a penal institution, he remains in "*semi-custody.*" The purpose or theory of such an arrangement is that probation status, with attendant supervision and its emphasis upon law-abiding, responsible conduct on the part of the probationer, can be most conducive to the rehabilitation of criminal offenders as useful members of society.

However, probation, or the acquisition of probation status, must be kept in proper perspective. It is not a

---

[1] Relative to a deferred sentence, RCW 9.95.220 provides:

> If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

matter of constitutional right. It is a matter of privilege [fol. 52] or *grace*, authorized by the state legislature to be granted or initially implemented solely through an exercise of judicial discretion by the Superior Court judges of the state. *State ex rel. Schock* v. *Barnett*, 42 Wn. 2d 929, 259 P. 2d 404 (1953).

Furthermore, the fact must not be overlooked that probationers, as a class, are criminal offenders, both in a legal and social or community sense. And, once again, it should be remembered that each such person who is afforded the privilege of probation status by a judge of the superior courts of this state has either (a) pleaded guilty, or (b) has been convicted of an offense prohibited by the criminal laws of the state of Washington. No inference is intended that, once having broken the law, such individuals are forever branded as criminals and forever afterward are to be treated as such. But the plain emotionally unvarnished facts are that probationers have broken the law. They have a criminal record; and as a result society has a substantial interest in guiding or conforming their future conduct—of not in terms of atonement or punishment, then clearly in terms of the possibility of their rehabilitation as productive members of society.

While those having probation status are accorded considerable freedom and liberty, their status and rights in this respect, and the matter of their liberty and freedom as well as limitations and termination thereof, are not to be placed in the same category with the quantum of rights the average law-abiding citizens possesses with respect to civil liberty and freedom. Stated another way, probation-[fol. 53] ers are not average, consistently deserving law-abiding citizens. They have exhibited in the past a tendency (at least in one instance) to engage in legally disapproved antisocial conduct.

Considering probationers as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty—or have been convicted—and have been commited to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest

that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.

In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for administration of the state probation system. Judicial scrutiny, review, and control over the everyday matters of prison administration and/or parole administration is not only *not feasible;* it is *inadvisable* in the light of the particular expertise and training necessary to provide ef- [fol. 54] fective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be the most disruptive of prison programing, supervision, and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees." The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programing could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, over-all, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers with respect to the termination of their liberty to be at large in their communities than would

be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences in the status and the potential [fol. 55] for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are re-enforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations made with respect to the operation of our probation system. This legislation provides as follows:

> Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer *may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation.* In the event the judgment has been pronounced by the court and *the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be full force and effect,* and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. *If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.* (Italics ours.)

[fol. 56] It should be noted that the foregoing statute provides that any peace officer or state parole officer may rearrest a probationer *without warrant* or *other process;* furthermore, that the court may thereupon, in its discretion, *without notice, revoke and terminate* such probation. The statute further provides that suspended or deferred sentences may be *summarily revoked, sentence imposed, judgment rendered,* and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior court, there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the state probation system. We are not inclined, judicially, to impose, and to judicially assume responsibility for applying to probation those due process standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

State v. *Shannon,* 60 Wn. 2d 883, 889, 376 P. 2d 646 (1962), contains the following statement:

> (f) Imposition of sentence, *following revocation of probation,* particularly in felony cases, is part of the *criminal prosecution* within the contemplation of Const. Art. 1, § 22 (amendment 10), at which time a defendant is entitled to be represented by counsel. *In re McClinntock* v. *Rhay,* 52 Wn. (2d) 615, 328 P. (2d) 369; *In re Levi,* 39 Cal. (2d) 41, 244 P. (2d) 403. (First italicized portion ours.)

The petitioner relies strongly on the foregoing views expressed in *Shannon.* But the basic doctrinal premise of [fol. 57] petitioner's argument seems to be that the principle applied in the landmark decision in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), should be applied, or extended and made to apply, in a probation context.

We will first discuss the above-quoted portion of the decision of this court in *State* v. *Shannon, supra.* The criminal offender therein initially pleaded guilty to grand larceny. His sentence was deferred, and probation granted. As in the instant matter, violations of the conditions of probation were reported. A revocation hearing was held

at which the defendant was not represented by counsel and offered no evidence to counter reported noncompliance with the conditions of probation. Probation was revoked, and sentence was imposed. The criminal offender was thereupon transferred from probation supervision and custody to prison supervision and custody. The former probationer who thus became an inmate of the state penitentiary filed a petition for a writ of habeas corpus in the Superior Court for Walla Walla County. The matter was remanded to the Superior Court for Thurston County where the prisoner had been tried and convicted. *That court vacated the prior revocation of the criminal offender's probation and, furthermore, appointed counsel to advise and represent the petitioner at a hearing to be held on the question of whether or not probation status should be revoked and sentence imposed.* The Superior Court for Thurston County, with the defendant and his court-appointed counsel present, reached the same result as at the previous probation revocation hearing when the probationer had not been represented by counsel. In other words, probation was revoked, [fol. 58] and, immediately thereafter, sentence was imposed by the court. The defendant in the *Shannon* case thereupon appealed.

In the *Shannon* opinion this court, as indicated hereinbefore, did, in fact, comment upon the right to counsel in a probation context; i.e., the right to counsel apropos of (a) the revocation of probation and (b) the imposition of sentence. The language of *Shannon* cited by the petitioner herein could admittedly be interpreted, and extended, to the effect that a probationer whose status has been revoked has the right to counsel in a due-process constitutional sense at the imposition of his suspended or deferred sentence following revocation of his probation. *However, there was in fact no issue of the right to counsel explicitly before this court in Shannon.* The reason should be quite obvious. The probationer in *Shannon was in fact represented by court-appointed counsel* in the Thurston County Superior Court at the time of revocation of probation and the imposition of sentence. The issues specifically raised in *Shannon* are not issues herein.

State v. *Shannon, supra,* construed on the basis of the facts and the issues involved, and properly limited to the

decision therein, is not apt in terms of the facts in the instant application for habeas corpus by Jerry D. Mempa. Furthermore, the statements in *Shannon* as to an alleged right to counsel at a hearing concerning revocation of probation and at the time of subsequent imposition of sentence constituted dicta which, upon further consideration, the court is reluctant and unwilling to apply in the instant case as the law of this state.

[fol. 59] We also note in passing that *In re McClintock* v. *Rhay*, 52 Wn. 2d 615, 328 P. 2d 369 (1958)—cited in *State* v. *Shannon, supra—did not involve* revocation of probation and imposition of sentence. It is therefore distinguishable on this basis and provides no support for the claim of Mempa for a writ of habeas corpus in the instant case.

In this connection, we do not read *State* v. *O'Neal*, 147 Wash. 169, 265 Pac. 175 (1928), an early case involving a suspended sentence and a situation somewhat akin to the modern concept of probation, as being inharmonious with our reasoning in the instant case.

Insofar as *State* v. *Shannon, supra, In re McClintock, supra*, and *State* v. *O'Neal, supra*, may be inconsistent with the views expressed in this opinion, they are hereby overruled.

Our views as to the problem presented in the instant case may be summarized as follows: While probation is a modern innovation with much constructive potential in terms of the possible rehabilitation of criminal offenders, probation status, or the granting of it by the courts, is a matter of grace or privilege to be granted solely in the discretion of the courts. In the state of Washington the legislature has established a state probation system and and has provided for its functions, operations, and administration. The legislature has not prescribed that due process standards shall be observed and applied by the superior courts of Washington in the very limited, but admittedly significant, function performed in granting, denying, limiting and terminating probation status of [fol. 60] criminal offenders. We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termi-

nation or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state of Washington.

A criminal defendant adequately represented by counsel, who, with counsel at his side, upon the entry of a plea of guilty or in a trial culminating in conviction accepts probation status, does so on the basis of the existing statutes. These clearly authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial of constitutional rights, admittedly pertaining to more orthodox criminal proceedings in the trial courts of this state. In such a context it may even be said there has been a waiver of any right to claim denial of criminal due process procedure in a proceeding involving termination of probation status and the imposition of sentence.

Underlying petitioner Mempa's claim in the instant [fol. 61] case, there may have been, as indicated, some conjecture that the principles announced in the landmark *Gideon* case should apply or should be extended to proceedings involving revocation of probation and imposition of previously (a) suspended or (b) deferred criminal sentences. We are not constrained to read or apply *Gideon* in such a manner in the format or context of the administration of probation. Petitioner Mempa was adequately represented by counsel at the time he entered a plea of guilty and accepted the probation status. Thus, the petitioner was accorded full due process considerations at the appropriate time. He can make no valid claim of deprivation of an alleged constitutional right—at least not in a deferred sentence, probation, semicustody administrative context.

Nor can there be any valid contention that the decision of the United States Supreme Court in *Escoe* v. *Verbst*, 295 U.S. 490 (1935), is directly controlling of the instant

matter. That decision involved a petition for a writ of habeas corpus by an inmate of a federal penitentiary whose probation had been revoked by a federal district judge on an *ex parte* showing without the probationer being brought before the court. The main thrust of the opinion is that such a procedure clearly contravened the intent of Congress as expressed in the language of the applicable federal probation statute—requiring that "such probationer shall forthwith be taken before the court." The *Escoe* opinion clearly negates the applicability of any specific constitutional safeguards and negatives the existence of constitu-
[fol. 62] tional due process rights pertaining to matter involving the revocation of federal probation. The above-mentioned federal statutory requirements constituted the sole basis for granting the writ of habeas corpus.

Furthermore, *Escoe* v. *Verbst, supra,* did not involve any question of right to counsel—either at the probation hearing or at the imposition of sentence; and right to counsel at either stage of the proceedings is *the only* question raised by the petition in the instant case.

Thus, we do not regard the policy considerations and value judgments of the United States Supreme Court, as enunciated in *Escoe* v. *Verbst, supra,* to be controlling relative to our disposition of the instant matter. The appropriate federal statute required the presence of the probationer before the court during hearings concerning revocation of probation. The Washington statute likewise requires that "he shall cause the probationer to be brought before the court wherein the probation was granted." But there is no further statutory requirement as to presence of counsel, burden of proof, right to confront witnesses, et cetera.

In all fairness to a probationer—and consonant with regular and orderly court procedure—we would anticipate that probationers should and will be given an opportunity to present their side of the story to the court respecting reported violation of the terms or conditions of probation. But the scope of any such inquiry or hearing rests solely in the discretion of the superior court judges of the state [fol. 63] of Washington. No appeal, or a petition for a writ of habeas corpus, will be successful in this court where the question is whether the probationer was accorded his

constitutional due process rights at the hearing. He simply has none.

For the foregoing reasons, we find no merit in petitioner Mempa's allegations of denial of constitutional criminal due process procedural rights in the instant case. The application for habeas corpus should be denied. It is so ordered.

Finley, J.

We Concur: Rosellini, C. J., Hill, J., Ott, J., Hunter, J., Hale, J.

[fol. 64] Hamilton, J. (dissenting)—I dissent. The majority, in overruling those portions of *State* v. *O'Neal*, 147 Wash. 169, 265 Pac. 175 (1928), *In re McClintock* v. *Rhay*, 52 Wn.2d 615, 328 P.2d 369 (1958), and *State* v. *Shannon*, 60 Wn.2d 883, 376 P.2d 646 (1962), which inferentially or directly characterize imposition of criminal judgment and sentence as part of a criminal prosecution, have taken, in my view, an unwarranted, unjustified and unrealistic step backward in the administration of justice. They do this at a time and in an era when constitutional rights and due process concepts are receiving increasing and expanding attention. And, by so doing, they open the door to and invite continued and increasing federal court disapproval and supervision of state court criminal procedures. We have gone through this in connection with search, arraignment, appointment of counsel, and confession procedures. Fortunately, in this state, we have been able to adapt to new concepts without undue inconvenience, principally because our procedures have been administered in the most part with befitting and uniform regard to fundamental fairness in the treatment of individuals before our criminal tribunals. When, however, we depart from fundamentally fair judicial processes, and cavalierly authorize discrimination in the right to counsel between one whose judgment and sentence is imposed immediately following conviction or plea of [fol. 65] guilty and one whose judgment and sentence may be imposed anywhere from a few months to several years later, we are inviting probation and revocation procedures which can well lead to questionable and potentially voidable institutional commitments. Given no requirements for representation by counsel, it is inevitable that revocation procedures will vary from defendant to defendant, from county

to county, and from trial judge to trial judge. Such a situation may be acceptable in some administration contexts, but it can hardly be said to comport with the dignity of the judicial process or the traditional role of courts in criminal proceedings. Neither does it lend itself to the efficient administration of justice, for to short change an individual of any due process protections at the trial court level, when and where they can in the first instance he most effectively, efficiently and economically provided, is simply not good judicial policy. Disparity of standards among the courts in the search, confession and right to counsel cases has long since proven the unwisdom and inefficiency of such a course.

I have no quarrel with the majority's thesis that an errant individual who has been released from official custody by way of an order of deferred sentence remains, technically speaking, in "semi-custody" by virtue of probationary regulations. Neither do I differ with the theory that deferred sentences and probation are rehabilitative measures which descend upon the deserving miscreant "by the grace" [fol. 66] of the sentencing judge. But, I find little realistic support for the majority's denial of the right to counsel either at the time of hearing or of final judgment and sentence arising out of these fine phrases. It is one thing to say that there is no constitutional or due process right to the chancellor's "grace," but quite another thing to say there are no due process rights at such a critical stage of a criminal prosecution as the revocation of probation and the imposition of final judgment and sentence. The two simply do not go hand in hand.

It cannot be gainsaid that the recipient of the "grace" of an order of deferred sentence is the beneficiary of some very real and substantial advantages which do not flow to one who is sentenced to a custodial facility, or who is otherwise subjected to a final judgment and sentences. The individual with the order of deferred sentence in his hand is ordinarily permitted to return to his community, his family and his job, subject only to the behaviorial restrictions and conditions arising out of his probationary status. In a very realistic sense he is free, for his personal liberty is but slightly restricted. And, of significant importance, he is accorded the right, after a successful probationary period,

of coming before the court and petitioning for a negation of his conviction and a dismissal of the charges. He may thus clear his record and remove outstanding penalties and disabilities. This latter privilege, even if unaccompanied by the other benefits, is a matter of considerable importance [fol. 67] in our society today. It is clearly distinguishable from a procedural right. It amounts to a substantial right which is afforded by legislative enactment. RCW 9.95.240. Fundamental fairness and the dignity of the judicial process dictate that this right, to say nothing of the sacred right of personal liberty, should not be subject to nullification by the whim of peremptory "quasi-administrative" proceedings which do not even afford the right to be represented by counsel at the time of entering the nullifying judgment and sentence.

This court has held in *State* v. *Farmer*, 39 Wn.2d 675, 237 P.2d 734 (1951), that the recipient of an order of deferred sentence is not entitled to an appeal from his conviction until entry of final judgment and sentence.[1] Thus, the majority's view that due process concepts are fulfilled by affording counsel at the time of entry of the order deferring sentence, and that such concepts do not contemplate the right to counsel at any time thereafter to and including the time of entry of final judgment and sentence following a revocation proceeding is somewhat anomalous. In effect, the majority isolates this particular judgment and sentence from the context and concept of the ordinary criminal [fol. 68] criminal prosecution and says to the individual, you may now appeal for the first time in this prosecution; but, because you initially received a deferment of sentence, you are not now entitled to counsel to advise you of this right or to assist you in determining that a proper sentence is imposed. The reason for this legalistic tightrope walking is obscure to me, particularly when considered with the fact

---

[1] Of course, it is understood that the right of appeal following a plea of guilty is very limited. However, the deferred sentence statute permits entry of such orders following either a plea of guilty or a verdict of guilty. Hence, the right to counsel at the time of revocation must be considered in the context of either form of conviction.

that the final judgment and sentence, whether entered with or without an intervening order of deferred sentence, bodes well to deprive an individual of his personal liberty and to forever nullify any opportunity of clearing his record of the conviction.

The majority seek sustenance for their position in the statute dealing with revocation of suspended or deferred sentences. They quote with emphasis RCW 9.95.220, which provides in part that the superior court may, in its discretion, without notice, revoke and terminate probation. It may be granted that the statute purports to dispense with *formal notice* as a prerequisite to revocation; however, I find little in the statutory language or in any reasonable concept of fundamental fairness that dispenses with the necessity for some type of hearing or the right to be represented by counsel. On the contrary, by providing that the probationer should be brought before the court, after rearrest *for cause, i.e.*, violating his probation, it is fair to assume the legislature anticipated that a judicious judicial proceeding would ensue, during the course of which the fundamental [fol. 69] rights of society as well as those of the probationer would be respected. Certainly, the legislature did not intend that the courts should, at this stage of the prosecution, shed their traditional concern for fair play and due process concepts and assume a swashbuckling "quasi-administrative" attitude toward a defendant. At this point, it should be observed in passing that the legislature, in enacting standards for revocation of *parole*, provided that a *parolee* charged with a violation of his parole, short of conviction of another crime, would be entitled (a) to a fair and impartial hearing before the parole board, (b) to be represented by counsel at such hearing, and (c) to defend and present evidence on his own behalf. RCW 9.95.120. Thus, we have the incongruent situation of a convicted, incarcerated and paroled person possessed of more fundamental rights before an administrative board than this court is willing to afford to a probationer in a court of law.

Again, it seems to me, it is one thing to say that there is no legislative, constitutional or due process requirement of formal notice of a projected probation revocation, but quite a different thing to say there is no legal requirement for

holding a hearing, assessing the reason for revocation, or affording counsel, if not at the hearing, at least at the time of entry of an appealable judgment and sentence.

The majority also appear to proceed upon the premise that once a person stands convicted of a crime and qualifies [fol. 70] for and partakes of the conditional liberty afforded by an order of deferred sentence, he is immediately shorn of constitutional safeguards which otherwise surround a criminal prosecution. In short, the majority cast such a trespasser into the role of a second class citizen, despite the fact that his past history suggests the probability of reformation and warrants the grace of probation. It may be conceded that such a person, by virtue of the criminal conviction, waives or forfeits the benefits of some constitutional rights, *e.g.*, the right to further trial by jury. But, there seems to be little reason or justification to suppose that such a person waives or forfeits such basic and traditional safeguards as the right to be present at a judicial proceeding designed to revoke his probation, the right to be advised of the nature of the alleged probation violation, the right to present explanatory or mitigating evidence, or the right to be represented by counsel either at the hearing or at the time of imposition and entry of the appealable final judgment and sentence. While these rights as to probationers may not be fully spelled out in the federal and state constitutions, it would seem reasonable to conclude that they inhere in those documents, if in no other way than through the equal protection clause of the fourteenth amendment to the federal constitution. Certainly, there can be little doubt that the right to personal liberty is as valuable and sacred to one who has been convicted of a crime as to one who has not. I find nothing in our [fol. 71] constitutions that indicates a contrary belief. Neither can it be seriously questioned that the strength of our constitutional form of government lies in the protection afforded to the weak and unfortunate against injustice or arbitrary and capricious action. And, if this be so, it ill behooves us to sap this strength by isolating, with surgeon-like precision, various phases of a criminal prosecution for the purpose of parceling out, with Scrooge-like finesse, due process protections. Thus, it seems incompatible to say to a defendant that he is entitled to constitutional

safeguards in all the usual facets of a criminal prosecution, including the right to counsel at all stages of the proceeding, unless and until he is granted probation, whereupon due process concepts and society's interest in the preservation of fair standards of justice vanish in the mystical clouds of judicial grace. Instinctively one shrinks from this autocratic approach, for instinctively one feels that any person is entitled to be properly heard when a court of law undertakes to deprive that person of his personal liberty, conditional though that liberty might be.

The majority next point out that deferred sentences and probation are comparatively modern, flexible, sensitive and potent innovations in the field of criminology. From this they then posit that courts should be slow to translate into constitutional terms the theory that the "privilege" of probation is a matter of "grace," and that revocation is a [fol. 72] matter of "discretion." The majority, however, distort the probation concept and attach too much significance to the above quoted words when they characterize the revocation procedure as a quasi-administrative function, and thus seek to carry it beyond constitutional dimensions and beyond the normal range of the judicial process.

The adjudication of criminal guilt and the meting out of statutory punishment is distinctively, traditionally and constitutionally a judicial function. It is no more an administrative function than granting, denying or modifying a divorce decree, and it does not partake of an administrative function simply because there are alternative solutions available in a given case. With but relatively few statutory exceptions, the administrative function in the field of penology basically begins and ends with the supervision of the convicted offender. Because both the judge and the administrator may be interested and concerned with reformation of the offender does not mean that their functions become indiscernably commingled, and, because a judge may accept, reject, or modify a recommendation of probation or revocation by an administrator does not mean that the judiciary is disruptively invading a peculiarly administrative province.

The bare and unvarnished truth is that the courts should and do stand as a bulwark between the individual and the possibility of mistaken, prejudiced, whimsical or arbitrary

[fol. 73] administrative action. And, when the courts obeisantly hesitate to surround any facet of their proceedings and any individual involved therein with adequate, even though minimal, constitutional safeguards they are abdicating their responsibility.

The majority appear willing to concede that, while the granting of probation in the first instance is not a matter of right, a defendant is constitutionally entitled to be represented by counsel at that point. The stakes then are the defendant's liberty, his reputation and future record, and his appellate remedies. The state is represented by the prosecuting attorney. If the defendant receives a deferment of sentence and probation and subsequently stands before the same court accused by an administrative officer of a probation violation, the stakes are identical. The state is again represented by the prosecuting attorney and to some degree by the administrative officer. The defendant, however, now stands barren of a right to the assistance of counsel. I find no purpose, reason or fairness in this situation.

The fear that the presence of counsel would tend to convert such proceedings into protracted hearings is without merit and is nothing more than a red herring. If there is a valid factual issue as to the alleged probation violation, the defendant is not only entitled to a fair hearing, but as a matter of practical necessity he should have the assistance of counsel in evaluating his defense, assembling [fol. 74] his evidence, subpoenaing and interrogating his witnesses, and cross-examining opposing witnesses. The average defendant is otherwise virtually helpless, and it is only in this way that the court can be fully, intelligently and efficiently advised. In the vast majority of cases, however, there is no dispute as to the probation violation. The only issue is the nature and extent of the punishment, a matter of vital concern to both the defendant and the court. Here again counsel, with his knowledge of court procedures, the defendant's background, and the alternative solutions available can be of inestimable assistance to the defendant and of substantially more help than hindrance to the court. At the very minimum, the presence of counsel would assure the court that the defendant was advised of his situation, and remove the lurking feeling of unfairness that surrounds sending an unrepresented person to a penal institution.

Likewise without merit is the fear that providing constitutional safeguards at the revocation stage would weaken the rehabilitative purposes of probation. Retribution, however swift, should always be accompanied by fundamental fairness, particularly when administered by and through a court of law. In fairness to any probationer, the procedures utilized should be designed to avoid the possibility, however remote, of revocations founded on accusations arising out of mistake, prejudice and caprice. The threat of arbitrary or whimiscal commitment does not tend to [fol. 75] encourage either cooperation or successful rehabilitation. Reformation can best be accomplished by fair, consistent, and straightforward treatment of the individual. No doubt it was this thought, in part at least, which prompted the drafters of the Model Penal Code for The American Law Institute to provide, in Tent. Drafts Nos. 2 (1954) and 4 (1955), § 301.4, as follows:

> The Court shall not revoke a suspension or probation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

Finally, and perhaps fatally, the denial of counsel to a defendant at the revocation stage of probation could well raise serious constitutional questions of discrimination between affluent and indigent probationers. As the majority opinion inferentially points out, in all instances a probationer appearing before the superior court in a revocation proceeding will ordinarily be given an opportunity to be heard. As a practical and realistic matter, those probationers who can afford counsel will be accorded the opportunity of having counsel at their side throughout the proceeding. It would, indeed, be the rare superior court judge who would deny them such a privilege. Yet the majority would deny this right to indigents, thereby projecting discrimination between probationers who can afford counsel and those who cannot. Due process and equal [fol. 76] protection prohibit the accident of economic ability from being a criterion for right to counsel. See *Douglas* v.

California, 372 U. S. 353, 9 L. Ed. 2d 811, 83 Sup. Ct. 814 (1963); *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 Sup. Ct. 585 (1956).

Turning then from the general to the specific, the majority opinion, as it relates to petitioner, in effect concludes that petitioner by accepting a deferred sentence knowledgeably waived any and all rights to due process of law at the time of any subsequent revocation proceeding. Aside from the fact that it is extremely doubtful that any such theory of waiver was fully explained to petitioner at the time of the entry of the order of deferred sentence, the harshness and rigidity of the position taken by the majority is but emphasized by the facts appearing in this case. It is conceded by the attorney general, and supported by the record, that at the time of the offense, the arraignment proceedings and the revocation, all in 1959, petitioner was but 17 years of age. The record further indicates that petitioner had not completed the eighth grade, and that since 1956 he had progressed through a variety of state institutions including Green Hill Academy, Eastern State Hospital, the Diagnostic Center at Fort Warden, Western State Hospital, and again Eastern State Hospital with a conflict of opinion between the latter two facilities as to whether he was a psychopathic delinquent. His migrations through these various institutions were under the aegis of the [fols. 77-79] juvenile court. His first appearance in superior court arose out of the offense for which he is presently in custody.

Against this background, even the attorney general expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation hearing. And, under the circumstances, it would be somewhat of a strain, to say the least, to assume that he fully appreciated all ramifications of the order of deferred sentence and at the time of entry of that order knowingly, intelligently and competently waived all constitutional rights with respect to subsequent proceedings. *Johnson* v. *Verbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 Sup. Ct. 1019, 146 A.L.R. 357 (1938).

In summary and in conclusion, I would

(1) Reaffirm the right to counsel at the time of imposition of sentence as established in the *O'Neal*, *McClintock* and *Shannon* cases, supra;

(2) Prospectively overrule that portion of *In re Jaime* v. *Rhay*, 59 Wn.2d 58, 365 P.2d 772 (1961), which holds that a probationer is not entitled to counsel at the revocation hearing, and afford such right at all future revocation hearings; and

(3) Grant the writ of habeas corpus and remand petitioner to the sentencing court for rehearing and resentencing with counsel present.

Hamilton, J.

We concur in the result of this dissenting opinion.

Donworth, J., Weaver, J.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39048

[Title omitted]

ORDER OF CONTINUANCE—October 20, 1966

The petition of Jerry Douglas Mempa for a writ of habeas corpus having come on regularly for hearing before Department I of this Court on October 7, 1966 the petitioner being represented by Carl Maxey, and the respondent being represented by Lee D. Rickabaugh, Assistant Attorney General; and the Court having read and considered the petition and the respondent's return and answer, and it appearing that the application for a writ of habeas corpus and the return and answer raise the following issue:

Whether or not the petitioner was properly transferred from juvenile status for trial under the provisions of the criminal code, and, if not, what relief should be granted the petitioner.

It further appearing that the opinion in *Dillenburg* v. [fol. 82] *Maxwell*, 68 W.D. 2d 481, 413 Pac. 2d 940, controls a determination of this case, but that the opinion in the Dillenburg case is not yet final, a petition for rehearing having been argued before the En Banc Court on September 27, 1966, and not yet determined Now, therefore, it is hereby

Ordered that the hearing in the above entitled proceeding is continued to a date to be determined after the final disposition of *Dillenburg* v. *Maxwell, supra;* and

It is further ordered that both petitioner and respondent shall be afforded the opportunity to file amended briefs prior to the continued hearing and to present oral argument on the issue of the applicability of the final decision in *Dillenburg* v. *Maxwell, supra,* to the disposition of this proceeding.

Dated at Olympia, Washington, this 20th day of October, 1966.

/s/ Hugh J. Rosellini, Chief Justice.

[fol. 83] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39048

[Title omitted]

I, WILLIAM M. LOWRY, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the Order of Continuance, filed October 21, 1966; Transcript of Proceedings, *State vs. Mempa,* filed September 27, 1966, and the whole thereof, as they now appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 15th day of November, 1966.

William M. Lowry, Clerk of the Supreme Court, State of Washington.

[fol. 84] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 424

JERRY DOUGLAS MEMPA, Petitioner,

v.

B. J. RHAY, Superintendent, Washington State Penitentiary

ORDER ALLOWING CERTIORARI—February 13, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 249 614/713

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~734~~ 22

WILLIAM EARL WALKLING, PETITIONER

vs.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR CERTIORARI FILED OCTOBER 31, 1966
CERTIORARI GRANTED FEBRUARY 13, 1967

Supreme Court of the United States

OCTOBER TERM, 1966

No. 734

WILLIAM EARL WALKLING, PETITIONER

vs.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

INDEX

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

FOR THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF WILLIAM EARL WALKLING, PETITIONER

vs.

B. J. RHAY, as Superintendent of the State Penitentiary, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—Sworn to May 26, 1966

To the Chief Justice of the Supreme Court of the State of Washington:

WILLIAM EARL WALKLING respectfully alleges as follows:

I

He is the petitioner herein. This is an original application.

II

Petitioner is and has been confined in the State Penitentiary at Walla Walla, Washington, under a sentence of five years imprisonment for violation of probation granted on a conviction of second degree burglary.

III

Petitioner is illegally confined in the aforementioned because his rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and rights guaranteed by the Constitution of the State of Washington have been violated.

IV

Petitioner was arrested on February 24, 1964 while on probation from a conviction of second degree burglary. He was accused of forging several checks on February 2, 1963. Two days later, February 26, in an appearance be-

fore Judge D. J. Cunningham he was informed of his right to counsel on the forgery charge. Before further proceedings were had, petitioner was transferred to Olympia for a hearing on charges that he had violated his [fol. 2] probation. On May 18, 1964 a revocation hearing was held, and as a result petitioner was sentenced to a minimum of five years in prison. Petitioner's request for assistance of counsel at the hearing was denied and the hearing proceeded without counsel representing petitioner.

V

Petitioner's constitutional rights were violated at the hearing in the following manner.

Petitioner was denied his right to the assistance of counsel in a hearing which resulted in his being imprisoned. At no time did he waive the assistance of counsel. On the contrary he specifically requested such assistance on several occasions.

VI

A defendant charged with such activities as will result in a revocation of probation and the imposition of a prison sentence, is entitled to have the court appoint counsel to protect the petitioner's rights, and a failure to do so denies him due process of law in violation of the Washington State Constitution and the United States Constitution.

VII

WHEREFORE, petitioner prays that a Writ of Habeas Corpus may issue, directed to B. J. Rhay, commanding him that he have the bond of the petitioner, by him imprisoned and detailed, together with the time and cause of punishment and detention, before said Court, to do and receive what shall then and there be considered concerning said petitioner in pursuance of the law in such case made and provided.

/s/ Edmund J. Wood
Of Coney & Collier
Attorneys for Petitioner

Of Counsel:

/s/ Michael H. Rosen
MICHAEL H. ROSEN
American Civil Liberties Union
of Washington

[fol. 3]

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

WILLIAM EARL WALKLING, being first duly sworn on oath deposes and says: That he is the petitioner named in the above and foregoing petition; that he has read the same, knows the contents thereof, and believes the same to be true.

/s/ William Earl Walkling

SUBSCRIBED AND SWORN to before me this 26 day of May, 1966.

/s/ P. M. O'Brien
NOTARY PUBLIC in and for the State of Washington, residing at Walla Walla.

[fol. 4]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[File Endorsement Omitted]

To the Clerk:

The petition to proceed in forma pauperis is denied

Done June 21, 1966.

/s/ Hugh J. Rosellini
Chief Justice

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF WILLIAM E. WALKLING, PETITIONER

B. J. RHAY, as Superintendent of the State Penitentiary, RESPONDENT

MOTION FOR LEAVE TO PROCEED FORMA PAUPERIS—filed June 24, 1966

Comes now William E. Walkling, the above-named petitioner, and moves the court for an order granting him leave to file a Petition for a Writ of Habeas Corpus *forma pauperis*. The motion is based on the affidavit below.

Dated this 27 day of May, 1966.

/s/ William E. Walkling

AFFIDAVIT

STATE OF WASHINGTON)
) ss.
COUNTY OF WALLA WALLA)

Comes now William E. Walkling and first being duly sworn, on oath, states:

I.

That he is the petitioner in the attached Petition for a Writ of Habeas Corpus which, by this reference, is made a part hereof as if fully set out herein.

II.

That he is entitled to prosecute said writ because of his illegal confinement contrary to the Constitution of the State of Washington and of the United States.

III.

That by reason of poverty he is unable to pay the costs for such proceeding or give security therefor.

[fol. 5] WHEREFORE, the petitioner prays that the Court enter an order allowing him to proceed in this matter *forma pauperis.*

/s/ William E. Walkling

SUBSCRIBED AND SWORN to before me this 26 day of May, 1966.

/s/ P. M. O'Brien
Notary Public in and for the State of Washington, residing at Walla Walla

[fol. 6]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[File Endorsement Omitted]

[Title Omitted]

RETURN AND ANSWER—filed August 15, 1966

Comes now the respondent, B. J. RHAY, Superintendent of the Washington State Penitentiary, by and through his attorneys, JOHN J. O'CONNELL, Attorney General and STEPHEN C. WAY, Assistant Attorney General, and for return to the application for a writ of habeas corpus of WILLIAM EARL WALKLING, alleges:

I

That the respondent, B. J. RHAY, is the duly appointed, qualified and acting Superintendent of the Washington State Penitentiary at Walla Walla, Washington, a state institution for the care, confinement and rehabilitation of convicted felons sentenced and committed to a term of confinement by the superior courts of the state of Washington.

[fol. 7]

II

That the respondent, B. J. RHAY, has in his custody and in confinement in the Washington State Penitentiary, the petitioner, WILLIAM EARL WALKLING, pursuant to and in accordance with an order revoking deferral and imposing sentence rendered by the Superior Court of the State of Washington for Thurston County in Cause No. C-2941 approved by the court on May 18, 1964; wherein it appears that the petitioner had previously been convicted of the crime of BURGLARY IN THE SECOND DEGREE upon his plea of Guilty and sentence was deferred and the petitioner granted probation on October 29, 1962, which deferral of sentence and probation was

revoked by the court on May 18, 1964 and the petitioner, WILLIAM EARL WALKLING sentenced to a term of confinement of not more than fifteen years. A true copy of said order revoking deferral and imposing sentence is attached hereto and by this reference incorporated herein as though fully set forth.

FURTHER AND FOR ANSWER the respondent denies each and every material allegation and thing contained in the application of WILLIAM EARL WALKLING for a writ of habeas corpus except such allegations therein as may hereinafter be affirmatively admitted in the respondent's:

AFFIRMATIVE ANSWER AND DEFENSE

I

That on or about October 11, 1962, the petitioner, WILLIAM EARL WALKLING was charged by Information filed in the Superior Court of the State of Washington for Thurston County in Cause No. C-2941 with having committed on or about September 19, 1962, the crime of BURGLARY IN THE SECOND DEGREE. A true copy of such information is attached hereto and by [fol. 8] this reference incorporated herein as though fully set forth.

II

That on October 29, 1962, the petitioner, WILLIAM EARL WALKLING was brought before the Superior Court for Thurston County for arraignment upon the charges as contained in the Information at which time he was accompained by his attorney, W. N. Beal, at which time the petitioner was fully advised of his rights in the premises and the petitioner, having advised the court that he understood the nature of the charge and was willing and ready to enter his plea, entered a plea of Guilty to the crime as charged in the Information; thereafter, the Court entered its order deferring the imposition of sentence for a period of three years from October 29, 1962 granted the petitioner probation under the supervision of the Board of Prison Terms and Paroles, and, as a fur-

ther condition of such deferral of sentence, required the petitioner to serve ninety days in the Thurston County jail and pay his proportionate share of restitution for the crimes in which he was involved. A true copy of such order rendered on the 17th day of December 1962 is attached hereto and by this reference incorporated herein as though fully set forth.

III

That on May 2, 1963, a bench warrant was ordered by the Superior Court for Thurston County to be issued for the apprehension of the petitioner WILLIAM EARL WALKLING, on the basis of the probation officer's report that the petitioner had violated the terms of his probation. That thereafter and up until February 24, 1964, the whereabouts of the petitioner were unknown until on said date the petitioner was arrested by the Sheriff of Lewis [fol. 9] County, and thereafter an Information was filed in the Superior Court for Lewis County charging the petitioner with fourteen counts of FORGERY IN THE FIRST DEGREE and fourteen counts of GRAND LARCENY. On April 16, 1964, the petitioner was transported from the Lewis County jail to Thurston County jail pursuant to the bench warrant issued by the Superior Court. That on May 12, 1964, the petitioner, WILLIAM EARL WALKLING, was brought before the Superior Court for Thurston County for hearing on the petition of the prosecuting attorney for an order revoking the order deferring sentence and granting the petitioner probation at which time the petitioner requested that the matter be continued in order that the petitioner be afforded the opportunity to secure the services of an attorney and the matter was then continued to May 18, 1964 at 9:00 o'clock a.m. for further hearing. On May 18, 1964, at 9:00 o'clock a.m., the matter was again called for hearing at which time the petitioner was present in court without an attorney but the petitioner advised the court that Smith Troy, an Attorney at Law was supposed to represent him. The court then held the matter in abeyance until 9:15 a.m. of that day and the matter was again called and the defendant appeared without counsel and

the court proceeded to hear the testimony in support of the petition for revocation of the deferral of sentence and probation and, thereafter, concluded that the order granting deferral of sentence and probation should be revoked, whereupon the petitioner was, at that time, sentenced to a term of confinement of not more than fifteen years.

IV

That the hearing before the Superior Court for Thurston County, upon the petition for the revocation of the [fol. 10] deferral of sentence and probation in the petitioner's case was not a "criminal prosecution" as those terms are used in Art. I, § 22 as amended by the 10th Amendment to the Constitution of the State of Washington, nor a "criminal case" as those terms are used in the Sixth Amendment to the Constitution of the United States, nor do "due process limitations" apply to such hearings. *Mempa* v. *Rhay*, 68 W.D.2d, 871; *Jaime* v. *Rhay*, 59 Wn.2d 58, 365 P.2d 772.

WHEREFORE, the respondent having made its return and fully answered the application for a writ of habeas corpus of WILLIAM EARL WALKLING, prays that the same be denied and the proceedings dismissed.

JOHN J. O'CONNELL
Attorney General

/s/ Stephen C. Way
STEPHEN C. WAY
Assistant Attorney General

STATE OF WASHINGTON)
§
Thurston County)

STEPHEN C. WAY, being first duly sworn on oath deposes and says:

That he is an Assistant Attorney General of the State of Washington and one of the attorneys for respondent herein; that he has read the foregoing return, knows the contents thereof, and believes the same to be true.

/s/ Stephen C. Way
STEPHEN C. WAY

Subscribed and sworn to before me this 12th day of August 1966.

/s/ Paul J. Murphey
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

[fol. 11]

ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. C-2941

STATE OF WASHINGTON, PLAINTIFF

vs

JAMES ORIN REID and WILLIAM EARL WALKLING, DEFENDENTS

INFORMATION—sworn to October 11, 1962

Comes now Harold R. Koch, Deputy Proseeuting Attorney in and for Thurston County, State of Washington, and informs the Court that in said county and state, on or about the 19th day of September, 1962, the defendants above-named, JAMES ORIN REID and WILLIAM EARL WALKLING, did commit the crime of BURGLARY IN THE SECOND DEGREE, set out as follows, to-wit:

They, the said JAMES ORIN REID and WILLIAM EARL WALKLING, defendants, in the County of Thurston, State of Washington, on or about the 19th day of September, 1962, with intent to commit a crime therein, willfully, unlawfully and feloniously did break and enter the home of one Vern Johnson, situated in Thurston County, State of Washington, the same being a building wherein property was then and there kept for sale, use or deposit.

All of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

/s/ HAROLD R. KOCH
Deputy Prosecuting Attorney

STATE OF WASHINGTON)
: ss.
COUNTY OF THURSTON)

HAROLD R. KOCH, being first duly sworn, on oath deposes and says: That he is the Deputy Prosecuting Attorney in and for Thurston County, State of Washington; that he has read the foregoing Information, knows the contents thereof and believes the same to be true.

/s/ HAROLD R. KOCH

SUBSCRIBED & SWORN TO before me this 11th day of October, 1962.

_____
Deputy Clerk of the Superior Court

[fol. 12]

ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. C-2941

STATE OF WASHINGTON, PLAINTIFF

vs

JAMES ORIN REID and WILLIAM EARL WALKLING, DEFENDENTS

ORDER—December 17, 1962

This matter having come on regularly for hearing in open Court on the 29th day of October, 1962, the State of Washington appearing and being represented by Harold R. Koch, Deputy Prosecuting Attorney in and for Thurston County, State of Washington, the defendant, WILLIAM EARL WALKLING, being present in Court and being represented by his attorney, W. N. Beal, and the defendant being advised that a criminal charge had been filed charging him with the crime of BURGLARY IN THE SECOND DEGREE, and the Court having ascertained the true name of the defendant, and advising him that he might have additional time, not less than a day, as may be reasonably necessary, in which to enter his plea, and having advised the defendant that he was entitled to a trial by jury and said defendant, WILLIAM EARL WALKLING, having stated that he wished to proceed, and the Information having been read to the defendant and a certified copy thereof having been served upon him in open Court, and the Court having been advised by the defendant that he understood the nature of the charge and was willing and ready to enter his plea, and it appearing, and the Court having determined that the defendant is capable of and is exercising a free and rational choice, the defendant was then arraigned, and entered his plea of guilty to the crime as charged in the Information. Whereupon, the Court having heard the statement of the defendant and his attorney and of the Deputy Prosecuting Attorney, and the defendant being

asked whether there were any causes why judgment should not be pronounced and no sufficient cause being shown, and the Court and the defendant being fully advised in the premises, it is hereby

[fol. 13] ORDERED, ADJUDGED AND DECREED that the defendant, WILLIAM EARL WALKLING, be, and he is hereby guilty as charged. It is further

ORDERED, ADJUDGED AND DECREED that sentence be, and it is hereby deferred for a period of three (3) years from the aforementioned date of October 29, 1962, at which time the defendant shall appear before the Court and show cause why sentence should not be passed against him. It is further

ORDERED, ADJUDGED AND DECREED that as conditions of said deferral of sentence, the defendant, WILLIAM EARL WALKLING, shall maintain general good behavior and make monthly reports to the Board of Prison Terms and Paroles of the State of Washington and abide by their rules and regulations. It is further

ORDERED, ADJUDGED AND DECREED that as a further condition of said deferral of sentence, the defendant is to serve ninety (90) days in the Thurston County Jail at Olympia, Washington, with credit for time served. It is further

ORDERED, ADJUDGED AND DECREED that said defendant, WILLIAM EARL WALKLING, shall pay his proportionate share of restitution for all other crimes in which he was involved; and, further, that he shall pay the costs of his prosecution herein.

DATED this 17th day of December, 1962.

/s/ RAYMOND W. CLIFFORD
Judge

PRESENTED BY:

/s/ HAROLD R. KOCH
Deputy Prosecuting Attorney

APPROVED:

/s/ W. N. BEAL
Attorney for Defendant

[fol. 14]

ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. C-2941

STATE OF WASHINGTON, PLAINTIFF
vs
JAMES ORIN REID and WILLIAM EARL WALKLING, DEFENDENTS

ORDER REVOKING DEFERRAL AND IMPOSING SENTENCE—May 18, 1964

This matter having come on for hearing on the petition of Harold R. Koch, Deputy Prosecuting Attorney in and for Thurston County, State of Washington, for an order revoking the order deferring sentence herein as to WILLIAM EARL WALKLING, which order was granted October 29, 1963. The Court took notice that this matter had been previously before the Court for revocation of the deferral of sentence on May 12, 1964, at which time the defendant, WILLIAM EARL WALKLING, was present in court without an attorney. The Court ascertained from the defendant that he desired additional time to secure an attorney and the Court then and there continued the matter to May 18, 1964, at 9 o'clock A.M. for further hearing. The case was called at 9 o'clock A.M. on May 18, 1964, the defendant, WILLIAM EARL WALKLING, being present in court and still not having an attorney, but was advised by the defendant that Smith Troy was supposed to represent him. The Court waited until 9:15 A.M. and proceeded. The defendant appeared in these proceedings without counsel; the Petition to Set Aside Deferral of Sentence was read to the defendant in open court and a certified copy thereof was served upon him in open court. Clare Murray, the district probation and parole officer, was sworn and testified in regard to the

fourteen separate counts of forgery and the fourteen separate counts of grand larceny filed against this defendant subsequent to October 29, 1962, for criminal acts occurring subsequent to October 29, 1962; the Court having determined that the facts as set out in said petition are true, and having satisfied itself that the deferment [fol. 15] of sentence hereinbefore granted October 29, 1962, ought to be revoked and sentence imposed as provided by law; the Court being duly advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that the deferral of sentence heretofore granted upon defendant's plea of guilty to the crime of BURGLARY IN THE SECOND DEGREE in said order granted October 29, 1962, be, and the same is hereby revoked and set aside. It is further

ORDERED, ADJUDGED AND DECREED that upon defendant's plea of guilty, he is hereby adjudged to be guilty of the crime of BURGLARY IN THE SECOND DEGREE as charged in the Information herein and, as punishment therefor, the said WILLIAM EARL WALKLING be, and he is hereby sentenced to fifteen (15) years at hard labor in the State Reformatory at Monroe, Washington, and to pay the costs of prosecution herein.

SIGNED in the presence of the defendant, WILLIAM EARL WALKLING, this 18th day of May, 1964.

/s/ RAYMOND W. CLIFFORD
Judge

[fol. 16]

No. 39002

[Affidavit of Service By Mailing Omitted in Printing]

[fol. 17]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[Title Omitted]

AFFIDAVIT OF HAROLD R. KOCH—Sworn to September 7, 1966

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

HAROLD R. KOCH, being first duly sworn, on oath deposes and says: I am the Prosecuting Attorney in and for Thurston County, State of Washington. On May 18, 1964, I was Deputy Prosecuting Attorney in and for Thurston County, State of Washington, and I appeared on behalf of the State of Washington in the Thurston County Superior Court Cause entitled State vs. James Orin Reid and William Earl Walkling, under Cause No. C-2941. The case was called at 9:00 A.M. on May 18, 1964, on my petition for an order revoking the order deferring sentence as to William Earl Walking which had been granted on October 29, 1962.

The matter had previously been before the Court for revocation of the deferral of sentence on May 12, 1964, at which time Earl William Walkling was present in Court without an attorney. The case had been continued until May 18 because the defendant desired additional time to secure an attorney.

When the hearing again convened on May 18, the de-
[fol. 18] fendant advised the Court that an Olympia attorney named Smith Troy was supposed to represent him. The matter was adjourned for fifteen minutes, and then proceeded with the defendant appearing without counsel.

I have no recollection of whether or not the defendant William Earl Walkling specifically requested the assist-

ance of counsel or the appointment of counsel, and I have no recollection of what Judge Raymond W. Clifford might have said or not said if such a request was made. I also do not recall specifically whether or not Judge Clifford advised the defendant of a right to court appointed counsel.

I am of the opinion, however, that Judge Clifford did advise the defendant that he had a right to be represented by retained but not to court appointed counsel, and I am further of the opinion that had the defendant requested the court appointment of counsel his request would have been refused by Judge Clifford. Judge Clifford had a practice in all probation revocation proceedings of refusing to appoint counsel, and of informing those who requested counsel that there was not a right to court counsel in such hearings. The Judge did, however, permit the appearances of retained counsel for those who had them, and he was always willing to grant reasonable continuances for the benefit of retained counsel.

/s/ Harold R. Koch

Subscribed and sworn to before me this 7th day of September, 1966.

/s/ Anne E. Koch
Notary Public in and for the State of Washington, residing at

[fol. 19]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[File Endorsement Omitted]

In the Matter of the Application for Writ of Habeas Corpus of

WILLIAM EARL WALKLING, PETITIONER

vs.

B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, RESPONDENT

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS—October 18, 1966

This matter came on regularly for hearing before Department No. I of this court on October 7, 1966, the petitioner, WILLIAM EARL WALKLING being represented by his attorney, EVAN L. SCHWAB, and the respondent being represented by STEPHEN C. WAY, Assistant Attorney General, and the court having read and considered the application of WILLIAM EARL WALKLING for a writ of habeas corpus, and the respondent's return and answer, and attachments thereto, and it appearing that the application for a writ of habeas corpus and the return and answer give rise to the following issue:

1. Whether or not the petitioner's constitutional rights were violated upon the grounds that the superior court of the state of Washington in and for the county of Thurston in Cause No. C-2941 prior to the hearing on the motion to revoke the petitioner's probation and impose sentence upon his conviction of the crime of Burglary in the Second Degree, did

[fol. 20] not advise him of a right to be provided with an attorney to give aid and assistance to the petitioner to be provided for at public expense.

This court having considered the application for a writ of habeas corpus of WILLIAM EARL WALKLING, the return and answer of the respondent and the attachments thereto, the memorandum brief of the petitioner and the respondent, and having heard the oral argument by counsel for the petitioner, EVAN L. SCHWAB, and oral argument on behalf of respondent by STEPHEN C. WAY, Assistant Attorney General, and the court being fully advised in the premises, concludes:

1. The application of WILLIAM EARL WALKLING for writ of habeas corpus is controlled by this court's recent decision in *Mempa* v. *Rhay*, 68 W.D. 2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in *Mempa* v. *Rhay*, *supra*.

IT IS HEREBY ORDERED that the application of WILLIAM EARL WALKLING for a writ of habeas corpus be, and the same is hereby denied and the proceedings dismissed.

Done in the Chambers of the Chief Justice this 18th day of October 1966.

/s/ Hugh J. Rosellini
Chief Justice

[fol. 21]

[Affidavit of Service By Mailing Omitted in Printing]

[fol. 22]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 23]

SUPREME COURT OF THE UNITED STATES

No. 734, October Term, 1966

WILLIAM EARL WALKLING, PETITIONER

v.

B. J. RHAY, Superintendent,
Washington State Penitentiary

ORDER ALLOWING CERTIORARI—February 13, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 424.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 249615 712